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No. 90-1074

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

WAYNE ESTELLE, WARDEN, Petitioner,

v.

MARK OWEN McGUIRE, Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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RELEVANT DOCKET ENTRIES

DATE	DOCKET ENTRIES
May 12, 1982	Respondent sentenced to fifteen years to life in state prison for second degree murder
January 15, 1985	California Court of Appeal affirmes the judgment of conviction
March 21, 1985	California Supreme Court denies petition for hearing
July 15, 1987	United States District Court denies petition for writ of habeas corpus
May 8, 1989	United States Court of Appeals reverses the judgment of the District Court
April 23, 1990	United States Court of Appeals withdraws and vacates its first opinion
May 4, 1990	United States Court of Appeals reverses the judgment of the District Court

RELEVANT DOCKET ENTRIES

DATE	DOCKET ENTRIES
November 23, 1990	United States Court of Appeals denies rehearing and rejects the suggestion for rehearing en banc

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

IN AND FOR THE FIRST APPELLATE DISTRICT

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent,

vs.

MARK OWEN MC GUIRE,

Appellant.

H-3748

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REPORTER'S TRANSCRIPT ON APPEAL
FROM THE JUDGMENT OF
THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA, IN AND FOR
THE COUNTY OF ALAMEDA
HONORABLE BENJAMIN TRAVIS
[March 8, 1982]

--o0o--

[53] THE COURT: Counsel, are you going to have the doctor testify to anything other than the force used to cause these injuries?

MR. PLATT [Prosecutor]: I am going to ask the doctor to testify to the nature, extent in fact of several

trauma that was found on the dead child, and I also am going to ask the doctor whether or not he can identify the child as a battered child.

THE COURT: Okay. Is there any additional aspect of that you have an objection to?

MRS. SIMPSON [Defense counsel]: I would object, again, to any use of risk, so-called risk factors in his testimony. I don't whether that includes them or not.

MR. PLATT: I am not going to be duplicative. If I can prove risk factors through Dr. Levine, I am not going into that with this doctor.

[54] THE COURT: So, we wouldn't have testimony of that in this doctor?

MR. PLATT: That is correct.

THE COURT: We don't need to waste his time.

MRS. SIMPSON: I don't know if he is going to ask Dr. Hermann about the broken ribs.

MR. PLATT: Absolutely.

MRS. SIMPSON: It is my understanding that his conclusions about the nature of the injuries and whether or not they, the child was battered, did not include, did not, were not based upon any information about broken ribs or about previous bruises other than the one on the flank. That he did not have that information available when he --

THE COURT: He still has a right to testify that that lady had that bruise. What is your objection to that?

He is going to testify that he looked at X-rays and determined that that lady had those bruises.

Is that correct?

MRS. SIMPSON: No.

MR. PLATT: The X-rays, he saw the bruises. What I am trying to avoid here and where I think we are headed, if he is not permitted to testify about the significance of prior injuries, then we would have argument by defense counsel saying there is no evidence of any prior injuries.

THE COURT: I have no problem with that. I want to know if he is going to look at the X-rays and --

MR. PLATT: He has already looked at the X-rays.

THE COURT: What is your objection to that?

[55] MRS. SIMPSON: Because at the time he formed his opinion about the cause of the injuries, about whether or not the child was a battered child, he didn't have that information. So his opinion was based upon other information and that information was not part of the information that he used.

THE COURT: Now, can we determine, Doctor, in reviewing those X-rays and telling us what you see in the X-rays, are you relying upon any social information that was given to you?

THE WITNESS [Dr. Hermann]: No.

THE COURT: Okay. Your objection is overruled. The testimony is going to come in.

MR. PLATT: There is one social comment, I think the doctor did have at his disposal because Detective Gillis was present at the time of the autopsy and that was the inconsistent history of taking a fall from a 16-inch high couch to a walker that is on the floor.

THE COURT: I have no problem with that.

MR. PLATT: That is a form of social history, that doesn't go to his risk factors.

THE COURT: I have no problem with that.

MRS. SIMPSON: Your Honor, I would object again on the same basis as to any testimony that indicated to him that there was a battered child.

THE COURT: His testimony is --

MRS. SIMPSON: Under Joseph.

THE COURT: His testimony was that that, that this, this injury was inconsistent with that description of how it occurred.

MRS. SIMPSON: Okay. If that is as far as it goes.

[56] MR. PLATT: And this child is a battered child.

MRS. SIMPSON: If he is going to take that additional step, saying that in his expert opinion that means that that child is a battered child, then I would object and I would object on the same grounds that I objected to before and cite Joseph.

THE COURT: Wait a second. What is the doctor's basis for concluding that this is a battered child?

MR. PLATT: That the child has seven old broken ribs, has a multiple blood trauma to the stomach, has a

bisected liver, a pulverized pancreas, a bruised lung.

THE COURT: He would be permitted to testify to all of that?

MR. PLATT: Yeah, and then he is then provided a history that the child took a 16-inch fall and it is inconsistent with that.

This is, I think I indicated the incident of the battered child syndrome --

MRS. SIMPSON: That is what I objected to. This last thing.

THE COURT: Okay. We don't need the doctor any further. Why don't we resolve that among ourselves. Well, we will excuse the doctor at this time.

MR. PLATT: Pardon me, one more thing.

Is battered child syndrome a recognized medical diagnosis?

THE WITNESS: Yes.

. . . .

[60] THE COURT: Okay. With regard to the doctor, the testimony of Dr. Hermann, we have no problem. That will be admitted. The only problem I have is the portion of the testimony of the pediatrician.

MR. PLATT: Dr. Levine.

THE COURT: Yes. Dealing with the kind of testimony that [61] has just been recently held inadmissible in People v. Joseph.

MR. PLATT: I don't know what to say. Joseph is the only case that goes to that direction in the State of California.

THE COURT: It is higher that I am and then I am bound to follow it.

MR. PLATT: Then you have to ignore Wright and Schockly and Steegler and Izeros and two of those if not three are Supreme Court cases.

THE COURT: Where in Wright says that that type of information is appropriate?

MR. PLATT: I think it is used --

THE COURT: I went through the three cases you gave me and I couldn't find anything in there. Only one of them, one of the 72 dealt with that and it didn't

deal with -- in Ewing it didn't deal with this kind of testimony.

MR. PLATT: That is true enough. But, one of these cases and I have been searching while you have been reading deals with the testimony involving the profiles of the battering parent, abusing family. I think it is probably in Landeros vs. Flood which does in its footnote acknowledge the expanding field of medical literature involving the risk factors that are used by the courts, pardon me, by doctors in identifying who is at risk as a battered child.

MRS. SIMPSON: Your Honor, I would point out in that case it was not a criminal case. It was a case, I believe, where a doctor was being sued for negligence.

For failing to report a suspicious case and the standards in that kind of case might we be different from the standards in a criminal case. There [62] the doctor, as I understand Ewing stated in her testimony this morning, is supposed to look at a minimal evidence of abuse, not even battered child syndrome. If they find that, further investigation is supposed to take place, so that I think is a different situation and distinguishable case.

THE COURT: Let me ask you for an offer of proof. What is it she is going to testify to with regard to this?

MR. PLATT: Risk factors?

THE COURT: Yes.

MR. PLATT: I intend to run every significant and available evidentiary fact of the social setting or milieu to use the language of Landeros vs. Flood in which this murder takes place and ask whether or not those factors placed this child at risk in the context of the battered child syndrome.

THE COURT: That is the very thing that was dealt with in Joseph, is that correct?

MR. PLATT: Precisely. I will bring this thing to a head real quick.

THE COURT: Let me do this. Until you can show me some other case by the Supreme Court authorizing that sort of testimony, I would have to follow Joseph.

MR. PLATT: I would have to follow Landeros vs. Flood.

THE COURT: But that is not a criminal case.

MR. PLATT: But it cites and includes the body of law of our criminal cases and imposes standards by that which is meant the truth in civil cases is different from a criminal case. I don't know how --

MRS. SIMPSON: Your Honor, I believe it cites Jackson. I [63] may be wrong, but I believe it cites Jackson for the definition of the battered child syndrome and that is a restricted definition.

THE COURT: Joseph came after Landeros, is that correct?

MR. PLATT: And Landeros is a Supreme Court case.

THE COURT: And Landeros was on the books when they decided Joseph.

MR. PLATT: Landeros was not considered. Nowhere in the Joseph opinion is that opinion cited. Nowhere in the Joseph opinion is any case other than Jackson, the 1971 case cited, and then Jackson is not even followed by the Joseph decision. It is paid lip service, merely, and it goes off on Jackson standing for the proposition if a physician can render a decision which bears upon the ultimate facts that goes to the jury, in no case does it talk about admissability of expert opinion testimony, indicator, reason for opinion involving the battered child syndrome. You know, I am stuck with Joseph as the standard, but it is the only case way out on the subject in the State of California. That is why we have seen fit to seek a review and repeal of that decision.

THE COURT: I can't repeal it.

MR. PLATT: I know you can't, but nowhere does it say you have to follow it because you have appeal authority or other directions by the Supreme Court.

MRS. SIMPSON: Your Honor, I don't think there is any authority in other divisions by the Supreme Court in allowing those risk factors in.

MR. PLATT: In other words, the doctors can testify, but [64] they can't give us the reasons.

THE COURT: Dr. McNie can testify as to the battered child. We are just talking about whether or not this can be done by the pediatrician.

MR. PLATT: Any expert qualifies, anybody who has training, experience, education, et cetera, takes them out of the realm of the layman, qualifies for it. Landeros vs. Flood says the battered child standard, the standard of care imposed by medical practice, particularly in the subject of medical testimony, and another factor is another factor that Joseph fails to address, I mean --

THE COURT: I think the --

MR. PLATT: One of the things that Dr. Kempie went off on is the battering parent himself, a battered child. And for years that is thought of one of the many indicators. That has been gone on abroad. The fact of the matter is this Defendant himself is a battered child and yet I would be barred from introducing that into evidence. If I could get his brother up here --

THE COURT: The fact that the victim is a battered child, is a fact being testified to by Dr. Hermann.

MR. PLATT: Okay. But what you are limiting me to is the opinion, you are allowing me to affix a label without the underlying reasons why this label applies. You are opening it up for the defense to mislead this jury under the guise of keeping outside risk factors and that is the danger I apprehend and that is what I seek to address now.

THE COURT: Well, the problem I have with the risk factor [65] is that Joseph says it shouldn't come in. The fact that you have a battered child here is something that is coming in because Dr. Hermann is going to testify to that.

MR. PLATT: The Joseph opinion, when you read it, says that Judith Poem was testifying off the wall about matters which had no evidentiary bearing to the case. The fact of the matter is, and the record on appeal in both courts shows that there was, that that was the uncontradicted state of the evidence that that factor did apply to that case. Why the Court chose to ignore it, I have no way of knowing.

MRS. SIMPSON: Your Honor, I don't think that is what Joseph said. I don't think Joseph said those risk factors weren't present in that particular case. I think it is arguing even if they were present, it was inadmissible. I think again the analogy it makes is with bringing in testimony of a burglary, about whether the person was

poor, which they may well be. Whether the person came from a broken home, which they might well be. Whether they had at that time, all kinds of other things. Even if they were all through and there was evidence of those things, they would not be admissable from an expert sociologist's testimony that those things were correlated.

MR. PLATT: Well --

MRS. SIMPSON: With burglaries.

MR. PLATT: I would merely observe that since 1962 and Dr. Kempie published his article and a few years before with Kathy and Sinagol and some other medical writers, the matter, the subject, the concept, medical fact of anomaly of the battered child has come a long way baby to paraphrase the television [66] commercial. What this says by paraphrasing of Defense Counsel seems to be that this jury in trying a battered baby murder is to be denied access to the facts that bear upon the expert's opinion as to whether or not this baby is in fact a battered baby. We are to ignore the last two and a half decades of medical advances in the field, in the name of a case that does not, frankly, that stands out on its own. I would urge the Court to ignore it. Because I cannot predict what the Supreme Court will do, but we are currently, certainly urging them to reverse this decision, which seems to put medical sciences back in the ages of witchcraft and deny this jury the ability to hear competent evidence on the subject that is peculiarly compelling in this type of a case.

MRS. SIMPSON: Your Honor, as Counsel pointed out himself, some of the hallmarks mentioned by Kempie are no longer considered valid. I think that there are a number of other factors that are matters of dispute, not a matter of an exact science in this matter. It is unusual to allow this kind of material in. It seems it is the very kind of situation that we have to be very careful about.

THE COURT: Okay. Dealing with the testimony, the sociological testimony, the case holds, she also testified to certain risk factors which may have existed in this case and are correlated with child abuse, stress in the home.

MR. PLATT: Which may have, I believe you said.

THE COURT: Yes, stress in the home. Premature births, early medical problems, absence of a parent, slowness to toilet training, parent's perception that the child is different.

[67] At this time it is compatible to a sociologist testifying that a defendant was probably guilty of burglary because he was a member of a minority group, grew up in a poor neighborhood, dropped out of school, was unemployed, and a relative with a criminal record, et cetera. The fact that this is testified to by the social worker may be correlated with the occurrence of the battered child syndrome, but the testimony was misleading because it gave no indication of the frequency with which the factors exist, but the syndrome does not occur. It had no tendency in reason to show that this case was one in which the factors existed and the syndrome occurred.

MR. PLATT: I can't argue with the fact that that language occurs there. However, I can argue with the facts of the Court's analysis and the record on appeal, which is why we are taking it off.

Dr. McNie at that trial, which I prosecuted personally, testified to incidents which certain factors occur in his study at that time.

Dead babies, battered dead babies in Alameda County over the preceding 16 to 18 years. Each and every risk factor testified to by Judith Cohn was uncontradicted that the child of that case was put into evidence by other witnesses. Why the Court missed the evidence, is beyond me. But they did. They misread Dr. McNie's testimony, and I don't know what to say. I guess it is horse on the baby and down the toilet with the battered child syndrome testimony by two and a half decades by the medical profession.

MRS. SIMPSON: Your Honor, the fact that Dr. McNie testified [68] about his findings with dead battered children does not answer the question raised by the Court in Joseph.

The Court's concern in Joseph was that there is not information on how frequently those risk factors occur in the population at large. Not how frequently they occur among battered babies. It serves like the argument that was made by a doctor in England when homogenized was shown to cause birth defect. He said well, that's like I gave them out so frequently, if that were true, every baby

should have it or it is, in fact, he was wrong in that case. But, or, you could say that every baby who got those later defects drank milk first. You can't argue from the existence in a non-population of some characteristics that there is a call for relationship. You have to know something about the frequency with which that occurred in the population at large. You have to have some more controlled studies. I think that is what he is objecting to there. That you are taking characteristics among a population of battered children without the appropriate information about how frequently those characteristics occur in the population at large. That is what Joseph says.

THE COURT: Yes, if we are dealing with the unreliability then I am controlled by it. He is saying that that, this is not elevated to a degree of scientific evidence that without these other tests having been made, that they can recognize.

MR. PLATT: I agree with your evaluation of what Joseph said.

THE COURT: Uh-huh.

MR. PLATT: My problem is that we hold, the medical [69] profession, health care professionals, teachers, social workers including Judith Cohn, accountable if they fail to diagnose and recognize and treat and report the very thing that they can't prove before this jury. I am among the horns of a dilemma and Mr. Justice White has refused in this opinion and informally to clarify that point.

THE COURT: Isn't the thing that is missing here some showing a of a controlled group that show that when we have these certain tendencies, that certain percentages of them turn out to be child abusers and a certain percentage turn out to be not a child abuser?

MR. PLATT: I believe you would find authorities in the Flood, footnotes that talk about the volumes of material in studying the battered child.

THE COURT: We are only dealing with one aspect of it and that is dealing with the risk factors.

MR. PLATT: Okay. Certain things attend a child being at risk. One of these is premature death. I'm sure Dr. Levine, when she talks about the standard, heh, show me a pre-me and I will show you the things that is different, who will not have the budding things with dad, who will be a problem child because of the attended medical burden of that child's first two weeks of life. That is one of the risk factors.

Another thing is strung out on dope. Is he strung out because he got canned, is he strung out for other reasons. Is mom strung out because dad is any of these things. Is she herself subject to some stress that is extraordinary, which stress defines as violent expressions in the body of this small [70] child. That is what we are talking about. We are talking about the social phenomenon that attends the battery of that child. These are provided --

MRS. SIMPSON: I think, Your Honor, you also find literature that shows that between about 24, 25 percent of the population with children have problems at work. Large percentages reports some marital problems. There aren't that many people battering their children. So that you pick out their characteristics, you find a few of them and you cannot conclude from that that this person caused, was, this caused the battering of the child.

MR. PLATT: We do not maintain that the battered child syndrome addresses itself to the identity of the perpetrator. We maintain as a diagnostic devise period. I am not looking to identify anybody through risk factor testimony.

MRS. SIMPSON: Your Honor, I think that Counsel recognizes that although that is technically true, that may not be the way that the jury uses the information, and that is another reason why you have to be particular careful in admitting this kind of evidence. If you say that, admit evidence that somebody has stress, lost his job, surely you are pointing to and you are saying that is relevant. Surely you are pointing to him or you can suspect the jury to draw that conclusion even though they might be otherwise instructed.

As I pointed out before, we are generally in the law very careful about bringing in evidence of prior acts without good evidence to tie a particular defendant to those prior acts. [71] For example, under 101 B, 1101 B you can't generally bring in prior acts or prior offenses

unless there is a preponderance of the evidence showing that the person did in fact commit the act. This is an exception, and it is a narrow exception and as you have, His Honor has pointed out, none of the cases, none of the criminal cases cited as to the child, battered child syndrome has this kind of evidence been admitted. The evidence is all physical injuries.

THE COURT: Okay. I feel bound by Joseph and therefore that testimony as to the risk factors I will exclude.

MR. PLATT: Okay.

THE COURT: Okay. Are we ready for the jury?

MRS. SIMPSON: Your Honor, I have one other thing I would like to mention before the jury is brought down. That is I would also oppose the admission of the earlier injuries, the admission of evidence of earlier injuries in this case. On the grounds that there is not sufficient evidence to constitute the battered child syndrome in this case. Again, the same cases that, I think that Your Honor has read on the issue of the risk factors is Wright, Flood and Landeros vs. Flood, People vs. Jackson, Ewing, in all of those cases the children involved have extensive histories of prior injuries and in those cases those injuries were much more closely tied to the defendant than they are in this case.

In this case there is evidence of healing broken ribs. There is evidence of some bruises. That does not begin to constitute the battered child syndrome under Davis,

sorry, under Jackson where there are a number of elements listed as constituting [72] the or as criteria for the battered child syndrome. In that situation I would argue that the evidence of the prior injuries should not come in. That it is contrary to the requirements, foundational requirements that any prior acts be established by the preponderance of the evidence. It is contrary to the section 1101 B of the Evidence Code that requires, that says that no character evidence can come in. It tends to be treated as character evidence by the jury. It also has the, it has a kind of bootstrap kind of argument. These injuries are not tied to my defendant, but you are going to ask the jury to say, well, because it, they occurred in the past, that that makes it more likely that he committed the injuries on July 7th, 1981 and that because the injuries on July 7th, 1981 were proceeded by the other injuries, then it is more likely that he committed, committed all of the injuries.

So, he is using them to get to the result where you want, where they shouldn't come in.

Also, I would object to the, it coming in under Section 352 of the Evidence Code as being not sufficiently probative and also being prejudicial.

THE COURT: You.

MR. PLATT: Now?

THE COURT: Yes.

MR. PLATT: First of all, and here is the evil in Joseph, and I'm sorry to linger on the subject. I can't

prove this child is a battered child through risk factors because I can't because of Joseph. Now, she says I don't want him to prove any of the physical facts that this child is a battered child [73] because this child, it is unduly prejudicial. This is a picture of an anus I have to recover from that, because at noontime I am informed that is an intentional trauma site. So I have a lacerated anus. I have a busted lung. I have eight, seven broken ribs, old injuries. I have the lung being a new injury. The anus being an old injury. I have a pulverized pancreas, a bisected liver and various trauma and one dead child. That is classically within the battered child syndrome.

True, Jackson addresses itself to so-called elements or components to the battered child syndrome. All in 1971, Your Honor, did the world stop and the Jackson case and the battered child death cases get cast in cement and stone in 1971. When incidentally, is the time frame when the Landeros vs. Flood medical malpractice suit arose, and it was the Jackson state of medical diagnostic ability of battered children that was addressed in Landeros in those terms noting the 1971 date.

So, I will submit it.

THE COURT: I have already ruled they are coming in. She is making a comment for the record.

MR. PLATT: I am sorry. I didn't know that. We have been over so much ground here I keep losing more evidence.

THE COURT: No. That testimony is admissable. The doctor is using it in the diagnosis. It is the battered child syndrome. I am going to admit it.

MRS. SIMPSON: Can I ask for one more clarification and that is whether Dr. Hermann could comment on the inconsistent acts of the injuries as being part of the battered child syndrome?

THE COURT: Well, his basic testimony is that that injury [74] could not have occurred in that manner.

MRS. SIMPSON: Right. My question is whether he can testify.

THE COURT: He can go then and in it further and say sure.

MRS. SIMPSON: That is indicative.

THE COURT: He can employ that that is part of the child syndrome.

MRS. SIMPSON: I wanted the record to reflect my objection to that.

THE COURT: You object and I have ruled on the objection. We may proceed.

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

IN AND FOR THE FIRST APPELLATE DISTRICT

PEOPLE OF THE STATE OF CALIFORNIA,	
Respondent,	H-3748
vs.	
MARK OWEN MC GUIRE,	
Appellant.	

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REPORTER'S TRANSCRIPT ON APPEAL
FROM THE JUDGMENT OF
THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA, IN AND FOR
THE COUNTY OF ALAMEDA
HONORABLE BENJAMIN TRAVIS
[March 15, 1982]

--o0o--

[567] THE COURT: . . . .

The next one was 2.50. 2.50.

MR. PLATT: That is the evaluation of evidence of other offenses.

MS. SIMPSON: Your Honor, my objection to that is that we, we specifically, that evidence was not introduced for the purpose of showing that the Defendant had committed other crimes, and I think it is misleading to say that. It was introduced to establish the battered child syndrome as I understood it, and was limited to that purpose.

MR. PLATT: It shows that the Defendant may have committed other crimes.

THE COURT: But, she is saying such evidence was [568] received and may be considered by you only for the limited purpose of determining if it tends to show.

Now, one thing that it was admitted for, was for impeachment?

MR. PLATT: Sure.

THE COURT: Because she had said the other crime was his inflicting injury on Mrs. McGuire and she had said she had been struck and you brought in the fact that she had been struck.

MR. PLATT: That's right.

THE COURT: So that was for impeachment purposes.

MS. SIMPSON: But, this instruction doesn't have anything to do about impeachment or --

THE COURT: That was the reason it was introduced.

MS. SIMPSON: Right, right.

THE COURT: So, I have to tell them that.

MS. SIMPSON: But, this is not an appropriate vehicle for that.

MR. PLATT: The other area are the seven broken ribs and the stoic lacerations of the anus and the bruises that Mrs. Short saw on the child on the date of May 25th, after the Defendant had twisted her face around.

MS. SIMPSON: Well, the ribs, I think are not an example. Perhaps the bruises are. Let's see.

I, now that you mention the bruises, I think this could come in for bruises, but not for the other things. But, I will withdraw my objection.

THE COURT: The question is which one of these [569] sections below are we going to bring it in for. What is the language that is going to be used?

MS. SIMPSON: That's right. That is the other problem. It has to come in for one of these purposes. I withdraw my withdrawal. It has to come in to those other purposes.

MR. PLATT: It goes to intent and identity.

MS. SIMPSON: It doesn't go to identity. All of the cases show --

MR. PLATT: It was not admitted for that purpose. First of all, the one relating to the striking of Mrs. McGuire was used, was permitted for impeachment purposes, only.

MR. PLATT: Okay.

Now, where the one where the kid's head gets twisted around and she comes up with the bruises on the face and

she is carried off around the corner by the Defendant holding her by one arm, at that time a five month old baby, is evidence of another crime. A 27035, one of abusing a child. It tends to show that he is the person as between the two who does this sort of thing, who abuses that child.

You have the five lacerations, oh, pardon me, seven broken ribs. You have the stoic lacerations to the anus, which Mrs. McGuire says shortly before the killing she extracted a stool from that area, which is, you know, of course the doctors had something to say about that. Then, you have the Defendant acting up around the baby.

THE COURT: So, you are saying it is for the first [570] one?

MR. PLATT: I am saying it is for identity and for intent, both.

MS. SIMPSON: Your Honor, the requirement for identity is clear. It has to be a very similar thing that you would be able to look at that particular offense and say by looking at that particular offense you can tell it is the same mode of action and it is something about the very way of doing that that says it must be that person and no one else. We are talking about hitting someone in the stomach, hard. That is not anything that you could say well, that shows it is the same person and pick somebody up by the arm or who said fed the baby roughly or who broke the ribs. None of those things.

MR. PLATT: None of the cases from Wiesberg, which is the first battered child syndrome case in 1968 forward, talk about having to, having to execute the intentional trauma with surgical precision, so that only broken ribs relates to broken ribs or only visceral trauma relate to visceral trauma. In fact, when you read Ishman, when you read Steiger for example, when you read Landeros vs. Flood, that child was burned as well as battered. Right on down the line. They talk about violence on this child that is not explained away by the inconsistent history, medical history provided by the caretaker.

MS. SIMPSON: But, those things are going to the issue of whether or not the child was battered or not. That is what that material, the testimony about the anus and [571] the ribs, that is what that material came in for. Does this child fit into the battered child syndrome. This instruction relates to similars, and there is a whole body of case law on similars. This doesn't relate to the battered child syndrome. It relates to similars.

MR. PLATT: It relates to both.

MS. SIMPSON: The only reason that that material came is was to say did that child die accidentally or not. It wasn't coming in to establish the identity of the perpetrator.

MR. PLATT: Pardon me, Your Honor. You could prove that the child was a battered child by proving a succession of injuries to that child, which are not

consistent with the history provided by the caretaker at the time of the injuries being suffered.

THE COURT: Uh-huh.

MR. PLATT: That caretaker raises the child, was a battered child, be that child a survivor or otherwise. You then have a situation in which a modality of violence is employed against the child, and if you establish later down the line, initially in our situation, we don't know who done it. Did mom do it, did dad do it. Or, this is a chance encounter with a stranger. Down the line, when you identify the agent of death as per Wright, which is at 60 Cal.App.3d at Page 6, once you identify the Defendant as the agent of death, then you may use these prior incidences of trauma to the child in that context. You have identified him as the killer.

[572] THE COURT: But, this is a different thing. I agree with her. If it is, the two purposes of the other incidents were permitted to come in for, was one for impeachment purposes and two, to establish the battered child syndrome.

MR. PLATT: Well, you also have Mr. McGuire, the Defendant, abusing the child in front of Mrs. Short.

Am I given to understand that I cannot aruge to this jury that he is self-identified by prior conduct as the perpetrator of the present conduct in connection with his rather, well, the nature of the self-serving declarations which I maintain represent, inclined ---

THE COURT: I am not precluding you from arguing that. I am saying when it was admitted, it was admitted for that purpose.

MR. PLATT: I think we are up to error. As long as the jury is regarded not to consider it as bad character testimony, the person who is trying to do evil deeds.

THE COURT: Okay.

MR. PLATT: Okay. So, what are we going to do with 2.50? There is going to be some modification.

THE COURT: This is what I am going to read to the jury.

Evidence has been introduced for the purpose of showing the Defendant committed a crime other than that for which he is on trial. Such evidence, which believed and is in evidence, may not be considered to prove that he is a person of bad character or that he has a disposition to [573] commit crimes. Such evidence was received and may be considered by you only for the limited purpose of determining if it tends to show impeachment of prior testimony or to establish the battered child syndrome.

MR. PLATT: Now, does that leave me out on the limb when I argue that since he is the guy who put the facial bruises on the child on May 25th, that he is the guy that did the killing?

THE COURT: No. You are just talking about circumstantial evidence.

MR. PLATT: Okay.

THE COURT: That is what you are talking about. Here is some evidence. Here you can infer that if he did it that time, you can infer that he did it that time.

MR. PLATT: She is probably going to say that I am trying to lie to the jury, and that puts me in an --

MS. SIMPSON: Your Honor, if it comes in for those two purposes, then he can't argue other purposes.

THE COURT: Yes. Wait a second.

Which is the testimony your are relying upon?

MR. PLATT: Okay. Specifically I am looking at the seven broken ribs. I am looking at the stoic lacerations of the anus and I am looking at the infliction of the bruises and the arm jerking number to which Mrs. Short testified, which all of that serves multiple purposes. One of which is to establish the child as a battered child. Secondly, it tends to identify the defendant, particularly this business with the face and the arm. The Defendant as the [574] perpetrator. Thirdly, it tends to impeach Mrs. McGuire, who says that oh, the Defendant was the milk of human kindness around this small child.

THE COURT: Okay. There is some evidence that came in for impeachment purposes only and some to deal with the battered child. Now, the other piece of evidence that you are referring to what you want to argue, there was an objection to that?

MR. PLATT: I don't recall what the transaction was, then. We had objections to every question.

THE COURT: Wait a second. What we will do is after we are finished with the rest of the instructions, we will have the Reporter go through the record to find out what it was admitted for.

MR. PLATT: Okay. Now we have another problem, there.

MS. SIMPSON: May I say --

MR. PLATT: Because once we have impeached Mrs. McGuire, it comes in for the truth of the matter stated and the truth of the matter stated is that he battered the child in front of Mrs. McGuire and Mrs. Short, and, therefore, it applies to the identity in intent issues, which are the course of the case, here.

MS. SIMPSON: Wait. First of all, we discussed in chambers and probably on the record that all, just grouping all prior injuries, I certainly understood that to come in for those limited purposes. I certainly understood that to include bruises as well as broken ribs and the problem [575] with the anus. You ruled that all prior injuries to the child could come in for those purposes. So, the fact that I didn't object when he asked something about the bruises should not allow him to get that in for some other purpose. They came in for those two limited purposes.

MR. PLATT: If it is admissible, it is admissible.

MS. SIMPSON: Well, for a limited purpose.

THE COURT: We are saying the two limited purposes were for impeachment and to establish the battered child syndrome.

MS. SIMPSON: That's right.

MR. PLATT: Well, we have to dip into the record, then, because I don't think it is subject to that kind of qualification.

THE COURT: Okay.

MR. PLATT: Because it certainly comes in for the truth of the matter in the prior inconsistent statement. It is proven through the mouth of an eyeball witness.

MS. SIMPSON: What is the prior inconsistent statement?

MR. PLATT: Mrs. McGuire says it never happened. Mrs. Short says it did. That comes in for the truth.

MS. SIMPSON: Mrs. McGuire wasn't present during the arming one, right? The only one would be the holding of the chin. That you could --

MR. PLATT: I believe she was.

MS. SIMPSON: No. That was not Mrs. Short's testimony.

[576] THE COURT: I am trying to find out how the lady has seen him grab the baby --

MS. SIMPSON: Hold the baby by the chin while he was feeding here, I believe was the testimony. She doesn't see whether the bruises --

THE COURT: And the other one saw him hold the baby by one arm.

MS. SIMPSON: Then she later saw him coming out of the door, holding him by one arm.

MR. PLATT: The him was a her.

THE COURT: I'm sorry.

MS. SIMPSON: Yeah, right.

THE COURT: What is that limited if that is the observation of the lady?

MS. SIMPSON: Because when we talked about what prior, what the prior injuries to the baby were coming in for, we limited all of those prior injuries.

THE COURT: Then, we are talking about going back and finding something on the record.

MR. PLATT: Then we have an additional problem. If that is the case, then what are we going to do with all of the witnesses coming in through hearsay, oh, I never saw the Defendant beat up the kid. She is certainly going to argue that, and I am precluded from arguing the contrary of that proposition.

MS. SIMPSON: I am just rebutting what you brought in that this was a battered child. That's all. That is what I had those witnesses there for. That same limited purpose [577] to say that this child was not a battered child.

THE COURT: Okay. When we are through, we will go back and find where that limitation was in the record and then I can deal with it from there.

. . . .

[March 16, 1982]

[645] MRS. SIMPSON: We left 2.50 before and I have what you asked to bring. I have two proposed instructions to substitute for 2.50.

MR. PLATT: Well --

THE COURT: Oh, we are on 1.

MR. PLATT: First of all, such evidence was received [646] and may be considered by you only for the limited purpose for determining if it tends to cause the injuries suffered by Cory McGuire was not accidental.

That overstates it a bit, because the injuries themselves are at issue. They tend to show the absence of, they tend to show the intent with which the Defendant acted, which goes certainly to the accidental shots suggested.

They also, the prior injuries also have a different function in that they tend to impeach the credibility of Mrs. McGuire.

THE COURT: I intend to give that. The question is do you want it tacked on to here or do you want to --

MR. PLATT: I don't care. I am amenable to any reasonable suggestion. I think 2.50 states it and I don't think you want to put an addendum to it to incorporate the Defendant's requested language is agreeable with me as long as you emasculate 2.50, because 2.50 addresses itself to intent and identity, both of which are the subjects

of the proposed instructions. So, I don't understand the necessity of special instructions.

MRS. SIMPSON: Your Honor, it is my recollection that when we discussed the introduction of these prior injuries, it was made clear that there was to be no implication or that they didn't imply that my client was connected to them in any way. That they were just there for the purpose of establishing the battered child syndrome.

The problem with the instruction 2.50 is that it does make that connection. It says that there has been [647] presented evidence of these prior offenses.

MR. PLATT: Well, of course that offer of proof was made before Mrs. McGuire got up and pulled her little act.

THE COURT: Uh-huh. That is for impeachment for her.

MR. PLATT: And that also comes in for the truth of the matter. It impeaches her and it establishes as a fact --

MRS. SIMPSON: Well, there was not any other independent evidence about the ribs, about the anus. I don't think that it did accomplish that purpose. There were not prior statements of Mrs. McGuire saying that they had, she had broken the ribs or that Mr. McGuire had broken the ribs or anything else that was inconsistent with what she said.

THE COURT: Well, the broken ribs comes in for the battered child syndrome.

MRS. SIMPSON: And I am saying it comes in for that limited purpose.

MR. PLATT: The jury can infer from the existence of the broken rib identification, it is like you may not see the brick layer making a wall, lay the first brick, but if you see him laying the thirty seventh, it is a fair inference that he is the one who laid the first one, the fifth one, the fifteenth one, especially if there is no one else around.

MRS. SIMPSON: Now, Your Honor, I think the Prosecutor is trying to get in what he couldn't have gotten [648] in –

THE COURT: What happened to 1101B?

MR. PLATT: 1101B has no application here. We are a battered child case. Everything, even including Joseph, if we are going to rely on that one, which again without analysis has no problem with the similars used in Joseph, in Joseph it was the beating which came in about the sibling.

MRS. SIMPSON: It shows battered child syndrome.

MR. PLATT: And it showed that Harold Joseph was the perpetrator of the murder. It takes it out of the accidental trauma.

THE COURT: That's right.

MR. PLATT: You can't do one without the other. They are to infer and connect. If you say it has no purpose, you are essentially to the jury. We can say it is

not accidental and you can't identify the perpetrator by reason of it.

THE COURT: What is the thing you are saying you don't want done?

MRS. SIMPSON: I don't want the instruction to say that there was evidence of prior offenses. I want the instruction to say that those evidence of prior injuries were introduced for the limited purpose of establishing the battered child syndrome and the reason we did that was to show that this was not accidental.

MR. PLATT: You have evidence of prior offenses and, you know, you have to tell the jury there is evidence of prior offenses. I mean, it is like the sun is up on the [649] sky right now even though you can't see it. Then you have to qualify it to say you are not entitled to infer therefrom that the man is a man of bad character, violent disposition.

MRS. SIMPSON: That's right.

MR. PLATT: I don't know how you get away from that unless error is invited here, and I am certainly not going to sit still for that.

THE COURT: Well, what modification are you requesting to the statement she is making?

MR. PLATT: The opening paragraph in 2.50, I believe, says there has been evidence of other offenses.

Let me turn to the page, here.

THE COURT: Evidence has been introduced for the purpose of showing that the Defendant committed a crime

other than for which he is on trial. Such evidence, if believed, was not received and may not be considered by you to prove that he is a person of bad character or the he has a disposition to commit crimes. Such evidence was received and may be considered by you only for the limited purpose of determining if it tends to show impeachment of prior testimony or establish the battered child syndrome.

MR. PLATT: Okay, or the existence of the intent which is a necessary element of the crime charged. The identity of the person who committed the crime, if any of which the Defendant is accused --

MRS. SIMPSON: I think the identity certainly can't come in. The facts don match those cases in which similars are brought in to show identity.

[650] MR. PLATT: I beg to differ to that. Start with Weisberg and run them all the way through, Judge, and they are there.

MRS. SIMPSON: I am citing the cases under 1101B.

MR. PLATT: Well, 1101A and B are considered in the similar authority under the battered child syndrome cases. In fact, I have never found a battered child murder case or battered, or a 273 or A or B prosecution in which similars were held erroneously admitted.

MRS. SIMPSON: I thought we had that all straightened out before. That the purpose they were coming in for a limited purpose.

MR. PLATT: I have a thirty three page brief that I prepared in the Dursk case.

Well, the points and authorities are twenty pages long.

THE COURT: Let me ask you this, this part about the clear connection between the other offenses and the one on which the Defendant is accused, so that it may be logically concluded that if the Defendant committed the other offenses, he also committed the crime charged in this case. You are saying he can't get that?

MRS. SIMPSON: Yes. I am saying that. I am saying that under 1101B, you have to, before you can bring that kind of similar in, you have to show that there is a preponderance of the evidence connecting Mr. McGuire to those prior offenses.

Now, what we are doing here is we are saying well, [651] he did the last one, therefore, he must have done the first one and because he did the first one he must have done the last one. It is a real bootstrapping option.

THE COURT: It is the only purpose of the battered child syndrome to show that somebody had access and was able to do these things, and you are not saying who did it. You are saying he may have done it or otherwise --

MR. PLATT: Some facts do on double duty, obviously.

THE COURT: Yes.

MRS. SIMPSON: Your Honor, my understanding was just to show the act and everybody in the initial

discussion of this said that the only purpose of this was to show that the death was not accidental.

THE COURT: But, this is saying a clear connection between the offense and the other offense and the one which the Defendant is accused.

MRS. SIMPSON: I understand that is what it is saying.

THE COURT: Well, what is the purpose of having a battered child syndrome if you are not going to use the connection?

MRS. SIMPSON: To show some accidental infliction.

THE COURT: No, I think --

MRS. SIMPSON: Nonaccidental infliction of --

THE COURT: I am going to give, I am going to give that portion of it.

MRS. SIMPSON: What, which portion?

THE COURT: Some evidence was received and may be considered by you only for the limited purpose of determining [652] if it tends to show:

1. The impeachment of prior testimony,

2. To establish the battered child syndrome.

Then, a clear connection between the other offense and the one which the Defendant is accused, so that it may logically be concluded that if the Defendant committed these --

Do we have any other ones?

MRS. SIMPSON: Did you decide on the Defendant's proposed jury instruction No. 2?

THE COURT: If we are going to do it this way, there is no need in giving it.

MRS. SIMPSON: So, you are denying?

THE COURT: I am going to deny these two and incorporate it in this.

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

IN AND FOR THE FIRST APPELLATE DISTRICT

PEOPLE OF THE STATE OF CALIFORNIA,	)	
Respondent,	)	H-3748
vs.	)	
MARK OWEN MC GUIRE,	)	
Appellant.	)	

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REPORTER'S TRANSCRIPT ON APPEAL
FROM THE JUDGMENT OF
THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA, IN AND FOR
THE COUNTY OF ALAMEDA
HONORABLE BENJAMIN TRAVIS
[March 17, 1982]

--o0o--

[756] Evidence has been introduced for the purpose of showing that the Defendant committed acts similar to those constituting a crime other than that for which he is on trial. Such evidence, if believed, was not received, and may not be considered by you to prove that he is a person

of bad [757] character or that he has a disposition to commit crimes. Such evidence was received and may be considered by you only for the limited purpose of determining if it tends to show three things:

1. The impeachment of Daisy McGuire's testimony that she had no cause to be afraid of the Defendant,

2. To establish the battered child syndrome, and

3. Also a clear connection between the other two offense[s] and the one of which the Defendant is accused, so that it may be logically concluded that if the Defendant committed other offenses, he also committed the crime charged in this case.

For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in the case. You are not permitted to consider evidence for any other purpose.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FIRST APPELLATE DISTRICT DIVISION ONE

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	A017800
Plaintiff and Respondent,	)	(Alameda County Super. Ct.
v.	)	No. H 3748)
MARK O. McGUIRE,	)	Filed Jan. 15, 1985
Defendant and Appellant.	)	

Defendant Mark O. McGuire was convicted by a jury's verdict of the second degree murder of his six-month old infant daughter, Tori. He appeals from the judgment which was entered upon the jury's verdict.

We affirm the judgment for the reasons we now state.

Evidence adduced at the trial, presumably found true by the jury, revealed the following.

Defendant McGuire, and his wife, Daisy, brought their infant child Tori into the emergency room of an Alameda County hospital one evening. The child was bluish in color, not breathing, and bruises appeared upon her body. Her father, McGuire, explained that Tori suffered recently from a cold, and had that evening injured herself when she fell from a couch. Prompt medical

measures of doctors and nurses were unavailing, and Tori died within the hour.

McGuire was thereafter charged with the murder of the child.

Expert medical witnesses at the trial testified to the following. When Tori was brought to the hospital, she indicated little or no signs of life, her body was cool, and she showed no heartbeat or pulse. She had a "relatively recent" bruise on her chest, with older multiple bruises around it. And there were blue marks on the infant's ears, and scar tissue indicating a tearing wound of her rectum.

An autopsy on Tori disclosed at least 17 separate contusions on her chest and around 30 in her abdominal area. They were "quite fresh," and suggested "perhaps the knuckles or fists striking the skin." An examination of her internal organs revealed that her liver had been split in two, her pancreas was lacerated and almost torn in half, her right lung and a large vein near the heart were damaged, and her lower intestine was lacerated. And she had several partially healed rib fractures. Such injuries appeared to have been caused by the same force or blows which caused the other injuries. The injuries could not have been caused by a fall from a couch; and nothing but the application of "blunt force to this child" could have caused them. A medical witness said: "I don't think you can separate injuries, one from another, those types of injuries. A tremendous number of contusions all over the

front of the body, the neck area, and the injuries to the abdomen are totally inconsistent with falling even 16 feet."

The child's rectal injury was at least six weeks old, and was unlikely to have been caused by passage of hard stools; more likely it was caused by "the forceful insertion of a finger, or foreign object, or both."

The consensus of the People's professional medical witnesses was that Tori was a "battered child."

Tori had been in the custody of McGuire and her mother during the entire six months of her life.

While Tori was being treated, and McGuire and his wife were seated together in a hospital waiting room, Mrs. McGuire several times insistently asked "what really happened?" McGuire replied that he "didn't know," and that he "guessed" the baby fell off the couch; his response was always the same. Finally Mrs. McGuire said, "You are responsible," to which he apparently made no reply.

To police officers McGuire explained that "the baby must have fallen and struck the walker." And when an officer expressed doubt that her condition was consistent with a fall, McGuire said "maybe some Mexicans came in."

McGuire denied striking or abusing the child.

Mrs. McGuire testified at the trial. For the first time, there she said that she had been mad at Tori because of her crying, and had hit her on the day of the baby's death.

A neighbor of the McGuires, in the same apartment building, testified at the trial to matters occurring before Tori's death. She had "heard some ruckus and normally

at that time there is just doors closing and cars starting up to go to work, but this time I heard noises, voices saying please don't, please don't, I got up and looked out my bedroom window and I saw Mark [McGuire] having Daisy [McGuire] up against the wall with his legs to her stomach, choking her and she is trying to pull away." On another occasion Daisy appeared "rather upset and she had looked as if she was crying because I saw the tears from her eyes. [She said that Mark had] hit her across the face."

The neighbor testified also that she had observed McGuire pick up the infant by "one of her arms." She had also seen him, when the baby was crying, roughly pinch her cheeks together, and do other "bad things." Mrs. McGuire, the witness said, was a "very caring mother" toward Tori, who was never seen to "abuse the child" in any way.

And evidence indicated that McGuire and his wife were the only persons with Tori on the day of her death.

We state McGuire's several appellate contentions as phrased by him.

I. Contention: "The trial court erred in admitting evidence of prior injuries which were in no way tied to appellant."

It was the People's theory that Tori's death was brought about by McGuire's "child battering," which

culminated in the events of the day of her death. And proof of the "battered child syndrome," has expressly been held admissible in this state.

A leading case on the subject, *Landeros* v. *Flood*, 17 Cal.3d 399, 408, has stated: "It appears from the literature that the battered child syndrome was first tentatively identified and reported to the medical profession in the early 1950s. Further surveys and analyses of the syndrome followed. . . . California courts have not been oblivious to this development. In a prosecution for child abuse reviewed in 1971 -- the same year as the events here in issue -- the Court of Appeal held admissible the testimony of a physician identifying the typical elements of the battered child syndrome. (*People* v. *Jackson* (1971) 18 Cal.App.3d 504, 506 [95 Cal.Rptr. 919].) The court explained that a physician's diagnosis of battered child syndrome essentially means that the victim's injuries were not inflicted by accidental means, and 'This conclusion is based upon an extensive study of the subject by medical science.' (*Id.*, at p. 507.) Citing portions of the literature referred to hereinabove, the court concluded (*ibid.*) that 'the diagnosis of the "battered child syndrome" has become *an accepted medical diagnosis*.' (Italics added.) Indeed, the Court of Appeal added that 'Trial courts have long recognized the "battered child syndrome" and it has been accepted as a legally qualified diagnosis on the trial court level for some time. . . .' (*Id.*, at pp. 507-508; . . .)"

And more recently the high court in *People* v. *Bledsoe*, 36 Cal.3d 236, 249, has said: "In *People* v. *Jackson* [18 Cal.App.3d 504] -- the first such case in California -- the court explained that '[t]his syndrome means that a child has received repeated and/or serious injuries by non-accidental means. . . . [T]he criteria for the "battered child syndrome" . . . are (1) the child is usually under three years of age; (2) there is evidence of bone injury at different times; (3) there are subdural hematomas with or without skull fractures; (4) there is a seriously injured child who does not have a history given that fits the injuries; (5) there is evidence of soft tissue injury; (6) there is evidence of neglect . . . [¶] A finding . . . of the "battered child syndrome" . . . simply indicates that a child found with the injuries outlined above has not suffered those injuries by accidental means.' (18 Cal.App.3d at pp. 506-507.) As this description suggests, the battered child syndrome cases fall well within the mainstream of a long line of California decisions which permit an expert medical witness to give an opinion of the cause of a particular injury on the basis of the expert's deduction from the appearance of the injury itself. . . ."

Under this authority, proof of Tori's "prior injuries" tending to establish the "battered child syndrome" was patently proper.

II. Contention: "Mistrial should have been granted when the highly inflammatory 'Mexican intruder' statement was elicited at trial."

McGuire argues that disclosure of the "inflammatory Mexican intruder statement" was not timely made to him under the trial court's discovery order.

As earlier noted, a uniformed police officer, not assigned to investigate the case, had commented to McGuire that the child's injuries seemed inconsistent with a fall from the couch. It was then that McGuire said, "maybe some Mexicans came in." The officer, believing the remark of no importance, made no note or report of it, and the prosecutor did not learn of the remark until a few minutes before it was offered in evidence at midtrial. The remark was relevant evidence, susceptible of an inference that such an absurd explanation might indicate a consciousness of guilt.

The trial court, following a hearing, concluded that there had been no intentional violation of the discovery order, and that the evidence's tardy disclosure was excused. The following courtroom colloquy took place.

"The Court: Let me ask you this. Since he didn't have this information before and didn't have an opportunity to give you this discovery before, if you have got a surprise element, then what do we need to enable you to deal with this situation? . . . If you need some time to do some investigation or check anything else out

brought out of the surprise element, I am willing to give you that. But as far as if you want to wait until your cross-examination and have somebody check something out or do anything, I am willing to accommodate you that way.

"Ms. Simpson [defense attorney]: I would be asking for some kind of instruction.

"The Court: Before we do that, why don't you do your investigation or whatever it is, if you are asking for time, then let's deal with it and then when we come back then we can decide how to best handle it. It may be something that you are going to get anyway in the natural course of things. If you could have gotten it in the natural course of things, then it may not be that damaging. . . . I feel that if there is a need for you to have further time to investigate into the origin and scope of this comment that is alleged to be made by your client, then I am willing to accommodate you.

"Ms. Simpson: I would like to have that opportunity.

"The Court: Okay. Can you do that by tomorrow morning?

"Ms. Simpson: I think I probably can."

We perceive neither abuse of discretion, nor error, in the trial court's resolution of the problem.

III. Contention: "The trial court erred in admitting appellant's statement which was the fruit of an unconstitutional interrogation."

On the evening of Tori's death, police officers, investigating the case, had questioned both McGuire and his wife. At that point McGuire was *not* under arrest or in custody; he had been so informed and the police had no intention of arresting him. And the *Miranda* admonition was *not* given. The couple were then asked to come to the police station the following day, and the decision to appear was theirs. Both parties "readily agreed." But by the time of their police station visit the next day, suspicion had focused on McGuire. Before any questioning, he was given an appropriate *Miranda* admonition, and the parties reiterated their earlier statements.

McGuire's instant argument is that the *first* police inquiry was in violation of *Miranda*, and that his subsequent Mirandized statements, offered in evidence at the trial, were its unconstitutional "fruits." The superior court had disagreed.

"[T]he trial court's ruling on a *Miranda* issue may not be set aside by us unless it is 'palpably erroneous.'" (*In re Eric J.*, 25 Cal.3d 522, 527.)

In ruling that McGuire's questioned statement might be admitted in evidence, the trial court stated: "There is nothing in here to indicate any reluctance on the part of the McGuires to go there. Their child had just died and there was an inquiry as to what was the cause of death. Nobody knew anything at that particular point in time. They were just trying to gather information. It was not

until Dr. Hermann does an autopsy that they become aware of the fact that there were multiple bruises and this was the cause of death. At that point in time, he was Mirandized and he was given his rights and gave a statement."

The *Miranda* requirement applies only to "custodial interrogation." In *Oregon* v. *Mathiason*, 429 U.S. 492, 494-495, the nation's high court stated:

"Our decision in *Miranda* set forth rules of police procedure applicable to 'custodial interrogation.' 'By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.' 384 U.S. at 444. Subsequently we have found the *Miranda* principle applicable to questioning which takes place in a prison setting during a suspect's term of imprisonment on a separate offense. *Mathis* v. *United States*, 391 U.S. (1968), and to questioning taking place in a suspect's home, after he has been arrested and is no longer free to go where he pleases. . . ."

The trial court's comment was well supported by law, and by the record. Its ruling was *not* "palpably erroneous."

IV. Contention: "Prosecutorial misconduct was so prejudicial that appellant was denied a fair trial."

McGuire makes four assignments of such misconduct.

It is first argued that the prosecutor charged in his jury argument, that Mrs. McGuire's "confession" that she had "hit" Tori on the date of the child's death, was fabricated. Such a statement had some record support. It was accordingly not misconduct.

It is also argued that "the D.A. implied that court rulings were incorrect." We find nothing in the record reasonably supportive of the argument. And the prosecutor's reference to first degree murder was patently harmless, for, as noted, the jury's verdict was of second degree murder.

Moreover, we note that as to *three* of the four assignments, no trial court objection was made, and that as to *all* of them no alleviating jury admonition, which surely would have dispelled any conceivable prejudice, was sought. The misconduct charges are for those reasons not cognizable on appeal. (*People* v. *Green*, 27 Cal.3d a, 27-36.) And as said in *People* v. *Fosselman*, 33 Cal.3d 572, 581: "[G]enerally such [claims of misconduct] are deemed waived if the defendant does not object to them at trial. . . . He may raise the issue for the first time on appeal only if the trial court could not have cured the harm flowing from the misconduct by a prompt admonition to the jury. . . . In the present case the harm could have been cured by timely warnings, and hence defendant may not now be heard to complain."

The judgment is affirmed.

Elkington, Acting P.J.

WE CONCUR:

Newsom, J.

Holmdahl, J.

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

San Francisco, California 94102
MARCH 21, 1985

I have this day filed Order

HEARING DENIED

No. **A017800**

PEOPLE

vs.

MARK O. McGUIRE

Respectfully,

Clerk

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

MARK OWEN McGUIRE, Petitioner, v. WAYNE ESTELLE, Respondent.	No. C 85-6521 TEH ORDER

Petitioner Mark McGuire was convicted of second degree murder in Alameda County Superior Court for the killing of his infant daughter. On May 12, 1982, petitioner was sentenced to a term of 15 years to life for the murder, and is currently serving this sentence at the California Men's Colony in San Luis Obispo. The California Court of Appeal affirmed his conviction, and the California Supreme Court denied his petition for a hearing. Petitioner applied to this Court for a writ of habeas corpus, alleging violations of his federal constitutional rights by the state trial court that convicted him, and this Court issued an Order to Show Cause. There are presently five claims before this Court: 1) denial of due process based on the improper admission of prior act evidence; 2) denial of due process based on erroneous jury instructions with respect to the admission of prior act evidence; 3) violation of the procedural

protections afforded by *Miranda v. Arizona*, 384 U.S. 430 (1966), based on the improper admission of a statement at trial; 4) denial of due process based on prosecutorial misconduct during the prosecutor's closing argument; 5) denial of due process based on denial of discovery. Having considered the papers of both parties and the entire record presented, this Court hereby denies petitioner's application for a writ of habeas corpus.

FACTS

About 9:00 p.m. on July 7, 1981, petitioner and his wife brought their six month old baby daughter to the Emergency Room of Kaiser Hospital in Hayward. The screening nurse noticed that the baby was bluish in color and not breathing. She immediately took the baby to an emergency treatment room, and then returned to the screening area to obtain a medical history. Petitioner told the nurse that the baby had a cold recently and had hit her head that morning when she fell off of the couch. The efforts of doctors to save the baby were unavailing, and she was pronounced dead at 9:45 p.m.

Sharon Levine, M.D., assisted in treating the baby and testified at trial that the child was essentially lifeless with no vital signs when brought to the hospital. Dr. Levine also testified that the baby had a large and relatively recent bruise on the upper left chest area with multiple bruises around it, black and blue marks on her

ears, and scar tissue indicating tearing around the rectum. An autopsy performed by Paul Herman, M.D., on July 8 revealed at least 17 contusions on the baby's chest, and 29 more on her abdominal area. When he examined her internal organs, Dr. Herman found that the baby's liver was split apart, her pancreas was lacerated and split apart, her lower right lung and large vein from the heart were damaged, and part of the large intestine was lacerated. Dr. Herman also discovered evidence of rectal tearing, which was a least six weeks old, and evidence of several partially healed rib fractures which were approximately seven weeks old.

The police arrived at Kaiser Hospital at 9:45 p.m., about the same time the baby was pronounced dead. The police separated the McGuires and briefly questioned them at the hospital about the baby's injuries. Petitioner indicated to Officer Lapic that the baby might have fallen off the couch and struck the walker which was next to it, although he was not sure. Petitioner was not given *Miranda* warnings before or during the questioning at the hospital, and he was not informed by police or by hospital personnel that the baby had died.

Petitioner and his wife were then taken to the Hayward Police Department in separate cars, and separately questioned there without *Miranda* warnings. Petitioner's wife told police that she had not hit the baby and that she did not know whether her husband had. At the end of the interview, the police told her that the baby

was dead. Petitioner told police that his wife had gone outside to make a telephone call, leaving the baby on the couch, and that he heard the baby cry while upstairs using the bathroom. When he came downstairs, he said, he found the baby lying on the floor. At the end of the interview, the police told him the baby had died but that they would not know the cause of death until the coroner completed an autopsy.

The police then drove petitioner and his wife to their apartment, had them sign a "Consent to Search" form, and then proceeded to take pictures and measurements of the home. Following the search of the apartment, petitioner was interviewed briefly in the parking lot to determine whether inordinate pressure had been applied to the baby's chest in an effort to revive her. In addition, Officer Lapic questioned petitioner outside the presence of other officers about the origin of the baby's bruises and was told that "Maybe some Mexicans came through the door" while he was upstairs, a statement that was not revealed until Officer Lapic's testimony at trial. No *Miranda* warnings were given up to this point.

The police called the McGuires the next day, July 8, and asked them to come to the station to discuss the coroner's report. Petitioner arrived at the station for questioning and there was advised for the first time of his rights under *Miranda*. He waived his rights and proceeded with the interview. About halfway through the interview, he was told that the coroner's report indicated the baby

had been beaten to death. Petitioner was arrested at the termination of the interview. His wife was not arrested and was granted transactional immunity by the prosecution. At trial, testifying for the prosecution, she stated for the first time that she had beaten the baby just prior to her husband's arrival at the house on July 7.

DISCUSSION

1. Admission Of Prior Act Evidence

In addition to Dr. Levine's testimony that the baby had sustained at least 46 contusions on her chest and abdomen, evidence was introduced of several partially healed rib fractures which were about seven weeks old and of a tearing wound of the rectum which was about six weeks old. Based on this evidence of past injuries, in addition to the more recent injuries causing death, both Dr. Levine and Dr. Hermann concluded at trial that the baby was a battered child. Petitioner now argues that this evidence of prior injuries to the baby, for which he was not on trial and to which he was not tied, was prejudicial and denied him due process of law.

For the limited purpose of showing that injury or death resulted from nonaccidental means, California courts have allowed admission of evidence of prior acts under California Evidence Code Section 1101(a). *See People v. Bledsoe*, 36 Cal.3d 236, 249 (1984). A diagnosis of

battered child syndrome, based on evidence of past injuries, is not an opinion that any particular person caused the injuries, but relates solely to the likelihood that the injuries were accidentally inflicted. *People v. Jackson*, 18 Cal.App.3d 504, 506-507 (1971). In this case, evidence of the two types of prior injuries was admitted by the trial court to support a diagnosis of battered child syndrome and prove that the baby's death was not accidental. This was a proper use of evidence under California evidence rules.

Since the evidence was admissible under state evidentiary rules, petitioner must demonstrate that a constitutional right was implicated by its use in order to merit habeas corpus relief. *Engle v. Isaac*, 445 U.S. 107, 119 (1982). Introduction of evidence must be so prejudicial as to result in a denial of fundamental fairness. *Palmer v. DeRobertis*, 738 F.2d 168, 170 (7th Cir. 1984). No showing of prejudice has been made by petitioner with respect to admission of prior act evidence. Petitioner argues that the prior act evidence was irrelevant, because no defense of accident was ever presented, and cumulative, because testimony of doctors at trial already established that death was not the result of accident without resort to prior act evidence.

The evidence, however, was relevant to the prosecutor's case-in-chief, despite the lack of an accident defense, in order to show that death was the result of criminal agency and to rebut the statement introduced at

trial that the baby may have died from falling off of a couch. In addition, the contention that the evidence was cumulative is speculative on petitioner's part. Even though the testimony of Dr. Levine supported the view that death was not the result of accident, without resort to prior act evidence, it cannot be said that this testimony alone conclusively established that position. Thus, the prosecution was allowed to introduce additional evidence, including evidence of prior injuries, to show the battered child syndrome and prove that death was not the result of accident. Moreover, even if admission of prior act evidence was irrelevant and/or cumulative, petitioner has not shown that it was so prejudicial as to amount to a denial of fundamental fairness. *See DeRobertis*, 738 F.2d at 170; *Cronnon v. State of Alabama*, 587 F.2d 246, 250 (5th Cir. 1979), *cert. denied*, 440 U.S. 974 (1979); *Thomas v. Cardwell*, 626 F.2d 1375, 1386 (9th Cir. 1980), *cert. denied*, 449 U.S. 889 (1981).

2. Jury Instructions Concerning Evidence Of Prior Acts

The state trial court instructed the jury on the use of prior acts evidence, including evidence of the two prior injuries to the baby, as follows:

> Evidence has been introduced for the purpose of showing that the defendant committed acts similar to those constituting a crime other than

that for which he is on trial. Such evidence, if believed, was not received, and may not be considered by you to prove that he is a person of bad character or that he has a disposition to commit crimes. Such evidence was received and may be considered by you only for the limited purpose of determining if it tends to show three things:

1. The impeachment of Daisy McGuire's testimony that she had no cause to be afraid of the defendant,

2. To establish the battered child syndrome, and

3. Also a connection between the other two offenses and the one of which the defendant is accused, so that it may be logically concluded that if the defendant committed other offenses, he also committed the crime charged in the case. You are not permitted to consider evidence for any other purpose.

Petitioner argues that Part 3 of this instruction improperly allowed the jury to base its verdict on acts for which he was not on trial and to which he was not connected, instead of limiting the use of the prior act evidence to show absence of accident.[1/]

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1. Petitioner also argues that Part 3 of this instruction allowed the jury to connect testimony that he treated the baby roughly on one occasion and that he slapped his wife on another occasion to the offense charged, because the jury might have believed those to be the "other two offenses" referred to. In reviewing the instruction, we find no merit to this contention. Part 1 and 2 of the jury instructions sufficiently indicate the use to which evidence of those two prior acts was to be put -- the slapping incident to rebut Daisy McGuire's testimony that she had no cause to be afraid of her husband, and the rough handling incident to rebut Daisy's testimony and help establish the battered child syndrome. Moreover, the reference in Part 3 of the instruction to "the other two offenses," when read in the context of the entire instruction and the trial, can only mean to refer the jury to the two prior injuries to the baby, not the slapping and rough handling incidents. Although the "two offenses" should have been specifically named in the instruction, this lack of clarity did not significantly prejudice petitioner's case at trial. *See United States v. Pruitt*, 763 F.2d 1256 (11th Cir. 1985).

Federal habeas corpus relief is not available to set aside a conviction because of an erroneous jury instruction unless the error rendered the trial so fundamentally unfair as to deny due process. *Ahlswede v. Wolff*, 729 F.2d 1108, 1111 (9th Cir. 1983); *Quig v. Crist*, 616 F.2d 1107, 1111 (9th Cir. 1980), *cert. denied*, 449 U.S. 922 (1980); *Shepard v. Nelson*, 432 F.2d 1045, 1046 (9th Cir. 1970); *Trujillo v. Stone*, 384 F.Supp. 633, 635 (N.D. Cal. 1974). The erroneous instruction must be so prejudicial as to affect the entire trial not merely an instruction which is "undersirable [sic], erroneous or even 'universally condemned'". *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977); *Cupp v. Naughten*, 414 U.S. 141, 146-147 (1973). The appraisal of the significance of error requires a comparison of the instructions actually given with those that should have been given. *Henderson*, 431 U.S. at 154; *Cupp*, 414 U.S. at 146-147.

It is a close question whether Part 3 of the jury instruction, allowing the jury to connect evidence of the baby's prior injuries to petitioner and then to the offense charged, was in violation of the California Evidence Code.[2/] However, we need not reach this issue because petitioner has not demonstrated that any possible error rendered his trial so fundamentally unfair that he was denied due process. *Ahlswede*, 720 F.2d at 1111. Admission of evidence of past acts, for the possibly improper purpose of connecting petitioner to those past acts and then to the offense charged, did not "infect the entire trial". *See Henderson*, 431 U.S. at 154. Examination of the trial record reveals that there was substantial evidence, however circumstantial, to support the jury's finding that the baby's death was the result of a murder and that petitioner was responsible. Admission of prior act evidence did not amount to a "crucial, critical, highly significant factor" in the jury's finding of second degree murder. *See Love v. Young*, 781 F.2d 1307, 1312-1313 (7th Cir. 1986). The jury heard evidence that

2. California Evidence Code Section 1101(c) makes evidence of other crimes inadmissible when offered solely to prove criminal disposition or propensity on the part of the accused to commit the crime charged. *People v. Nottingham*, 172 Cal.App.3d 484, 495 (1985). On the other hand, Evidence Code Section 1101(b) makes admissible evidence of prior acts relevant to prove some fact expressly in issue, such as the motive, intent, knowledge or identity of the perpetrator of the crime charged. Whether evidence is relevant under Section 1101(b) depends additionally on whether its probative value outweighs any undue prejudice. *People v. Tassell*, 36 Cal.3d 77, 88 (1984).

petitioner was in the house at the time of the baby's death and that his wife, the only other person in the house that day, stepped outside before the baby had been fatally injured. The jury heard petitioner's wife testify. This and other evidence allowed the jury to decide petitioner was behind the baby's death notwithstanding any prior act evidence.

3. *Miranda* Violation

Petitioner spoke with police and investigators several times on July 7, the day that he and his wife brought their injured baby to the hospital. No *Miranda* warnings were given to petitioner before or during any of these July 7 discussions. On July 8, petitioner was asked to come to the police station and when he arrived was given *Miranda* warnings before questioning took place. At trial, the prosecution introduced one of petitioner's statements, made on July 8, after *Miranda* warnings. Petitioner now urges that this statement was involuntary and in violation of his Fifth Amendment rights, because even though it was made after proper administering of *Miranda* warnings, it was the fruit of prior illegal interrogations by investigators.

Miranda warnings are required whenever a person questioned is in custody or the restraint on his freedom of movement is of a degree associated with formal arrest. *California v. Beheler*, 463 U.S. 1121, 1123 (1983); *Oregon v.*

Mathiason, 429 U.S. 492, 494 (1977). Mere presence at the police station cannot be necessarily equated with custody. *See Beheler*, 463 U.S. at 1123. Although this Court must independently make the legal conclusions as to whether a petitioner was in custody at the time of a statement, and as to whether statements were voluntary, this Court must presume the correctness of all state court factual findings, unless there is no factual support for them in the record. *Summer v. Mata*, 449 U.S. 539, 545 (1981).

The state court examined the discussions between petitioner and investigators voluntarily and while petitioner was not in custody.[3/] We find ample support in the record for this position. No restrictions were placed on petitioner's freedom of movement during any of the July 7 discussions, including those taking place at the police station. Upon accompanying the police officers to the station on July 7, petitioner was specifically told that he was not under arrest and was under no obligation to go there. Because all of the July 7 questioning took place while pettioner [sic] was not in custody, no *Miranda* warnings were required and the July 8 statement used at trial was not the fruit of prior illegal interrogation.

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3. The trial court did not consider the statement made at the apartment complex to one of the officers that "Maybe some Mexicans came through the door." However, this statement was also made voluntarily and while petitioner was not in custody, and does not alter our conclusion that all July 7 questioning was noncustodial.

Petitioner further argues that police used trickery and deception during the July 7 discussions by withholding from him information that his baby had died and that he was a suspect in the death. Petitioner contends that this deception rendered the July 7 questioning coercive and tainted the subsequent statement given after *Miranda* warnings. This Court finds no support in case law for the view that trickery or deception render questioning coercive. Petitioner was told he could refuse to speak and could request a lawyer and was aware that any statement he made could be used against him. Waiver of his rights on July 8 was thus free and voluntary and the statement coming out of the July 8 questioning was properly introduced against him. *See Moran v. Burbine*, 106 S.Ct. 1135, 1142 (1986).

4. Prosecutorial Misconduct

Petitioner argues that the prosecutor made several prejudicial remarks during closing argument which constituted misconduct and denied him due process of law. Only one of the allegedly prejudicial statements was objected to at trial by petitioner's counsel. That objection came at the beginning of the prosecutor's argument, during which the prosecutor discussed first degree murder in this second degree murder case. Petitioner's counsel, in his state appellate court brief submitted to this Court, claims that because this objection was overruled, he did

not want to continue to make objections during the closing argument which would almost certainly be overruled. The remarks complained of which were not objected to include: 1) statements implying that petitioner's wife offered testimony which was part of a defense plot to suborn perjury; 2) statements made that the crime would go unpunished if the jury believed petitioner had not commited [sic] the crime because his wife had been granted immunity; 3) an inflammatory statement that if the jury believed petitioner, it should send him home to pick up his other recently born baby; 4) references made to inflammatory and controversial cases in an attempt to link the apparent miscarriage of justice found in those cases to a not guilty verdict for petitioner.

Under California law, claims of misconduct can only be reversed on appeal if objected to at trial. *People v. Fosselman*, 33 Cal.3d 572, 580-581 (1983). Under *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977), the failure to observe a state's "contemporaneous objection" rules results in a procedural default which precludes habeas corpus relief. The only exception to this default rule occurs when a petitioner can demonstrate that there was "cause" for his failure to raise the objection at trial, and "prejudice" accruing from the failure to object. *Engel v. Isaac*, 456 U.S. at 129; *see also Hines v. Enemoto*, 658 F.2d 667, 673 (9th Cir. 1981). Even where instances of prosecutorial misconduct are properly objected to at the state trial, a federal court is limited to determining solely

whether the defendant was denied due process. *Donnelly v. DeChristofoto*, 416 U.S. 637, 642 (1974). The touchstone of due process is the fairness of the trial, not the misconduct of the prosecutor. *Smith v. Phillips*, 455 U.S. 209, 219-220 (1982).

Petitioner has effectively defaulted on those alleged instances of prosecutorial misconduct which were not objected to at trial. Failure of counsel to object to a prosecutor's statements for the strategic reasons does not satisfy the "cause" prong of the *Sykes* standard, and petitioner's argument, that his counsel failed to object at trial because he did not want to be continuously overruled, amounts to a failure to object for strategic reasons. *See Hines*, 658 F.2d at 673. In addition, although petitioner has preserved his claim that the prosecutor's references to first degree murder in his closing argument constituted misconduct, petitioner has made no showing of a constitutional violation. Petitioner has not demonstrated that his trial was rendered so fundamentally unfair by the prosecutor's remarks that due process was denied. *See U.S. v. Foster*, 711 F.2d 871, 883 (1983); *Thomas v. Cardwell*, 626 F.2d 1375, 1381 (9th Cir. 1980).

5. Dehial Of Discovery

In his petition, petitioner argues that the prosecution's violation of a discovery order denied him his

constitutional rights to a fair trial.[4/] The discovery order in question called for the prosecution to release all statements made by petitioner to police officers during any of the questioning preceding trial. Petitioner made a statement at his apartment in response to Officer Lapic's questioning regarding the origin of the baby's bruises, that "Maybe some Mexicans came through the door." This statement was not revealed to the defense before Officer Lapic testified at trial. Petitioner contends that the prosecutor's failure to comply with the discovery order and reveal the statement before trial violated his due process rights for two reasons. First, petitioner claims that the revelation of Officer Lapic's questioning regarding the origin of the bruises could have been persuasive to the trial court at the Motion to Suppress that the interrogation violated *Miranda*. According to petitioner, Officer Lapic's questioning indicated that the officer knew the criminal degree of force used upon the body. Second, petitioner maintains that his lack of awareness of the statement regarding Mexicans left his counsel "ill-prepared" to select the jury.

The Court finds that petitioner's claims lack merit. Even considering Officer Lapic's questioning of petitioner,

4. This claim is properly before the Court at this time even though the claim was not included in this Court's earlier Order to Show Cause. Petitioner's counsel has fully briefed the issue for this Court, and the Court finds that it is able to make a determination of this claim after careful review of petitioner's arguments and of the record before the Court.

this Court finds that the interrogation of petitioner did not violate his *Miranda* rights. In addition, this Court finds that counsel's lack of awareness of petitioner's statement did not violate petitioner's due process right to an adequate opportunity to voir dire the jury. Therefore, petitioner is not entitled to relief on his claim for violation of the discovery order.

Accordingly, good cause appearing, IT IS HEREBY ORDERED that petitioner's application for a writ of habeas corpus is denied.

IT IS FURTHER ORDERED that petitioner's motion for reconsideration of application for bail pending determination of petition for writ of habeas corpus is denied.

IT IS SO ORDERED.

DATED: July 15, 1987

THELTON E. HENDERSON
UNITED STATES DISTRICT JUDGE

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARK OWEN McGUIRE, Plaintiff-Appellant, v. WAYNE ESTELLE, Warden, Defendant-Appellee.	)	No. 87-2522 D.C. No. CV-85-6521-TEH OPINION

Appeal from the United States District Court
for the Northern District of California
Thelton E. Henderson, District Judge, Presiding

Argued and Submitted June 14, 1988
San Francisco, California

Filed May 8, 1989

Before: Mary M. Schroeder and Charles Wiggins, Circuit Judges, and Albert Lee Stephens, Jr.*/, District Judge.

Opinion by Judge Wiggins

*. Hon. Albert Lee Stephens, Jr., United States District Judge for the Central District of California, sitting by designation.

COUNSEL

Ann Hardgrove Vorhis, San Francisco, California, for the plaintiff-appellant.

Herbert F. Wilkinson, Supervising Deputy Attorney General, San Francisco, California, for the defendant-appellee.

OPINION

WIGGINS, Circuit Judge:

Mark McGuire ("McGuire") appeals from the district court's denial of his petition for a writ of habeas corpus under 28 U.S.C. § 2254(a). McGuire was convicted of second degree murder and is now serving a fifteen year to life sentence in a California state prison. McGuire contends that the admission of evidence of prior acts against him at his trial was error and denied him due process of law under the Fourteenth Amendment. We find that his contention has merit and REVERSE.

FACTS AND PROCEEDINGS BELOW

At about 9:00 p.m., on July 7, 1981, McGuire and his wife brought their six-month-old baby girl to the emergency room of a hospital in Hayward, California. The baby was bluish in color and was not breathing. The hospital staff were unable to save the baby and she was pronounced dead at about 9:45 p.m.

At trial, one of the baby's treating physicians testified that the child was essentially lifeless and without vital signs when she was brought into the hospital. The doctor also testified that the baby had a large and relatively recent bruise on the upper left chest area with multiple bruise marks around it, black and blue marks on her ears, and scar tissue indicating tearing around the anus. A doctor who performed an autopsy on the body testified that there were at least seventeen contusions on the baby's chest and twenty-nine more on her abdomen. Examination of the internal organs revealed that the liver was split in half, her pancreas was lacerated and split apart, her lower right lung and large vein from the heart were damaged, and part of her large intestine was lacerated. Over McGuire's objection, the doctor also testified to rectal tearing at least six weeks old and to evidence of several partially healed rib fractures approximately seven weeks old.

McGuire's wife was granted transactional immunity by the prosecution. At trial, testifying for the prosecution, she stated for the first time that she, and not her husband, had beaten the baby.

On March 19, 1982, the jury returned a verdict of second degree murder against McGuire. On January 15, 1985, the California Court of Appeal affirmed his conviction. McGuire petitioned for a hearing before the California Supreme Court. On March 21, 1985, the California Supreme Court issued a "postcard denial" of the petition. It did so without any citation or comment.

On August 30, 1985, McGuire filed a petition for writ of habeas corpus in federal district court under 28 U.S.C. § 2254(a). Order to show cause issued on February 26, 1986. In its original response, the state of California did not answer on the merits but argued that McGuire had failed to exhaust his state remedies. The district court, relying on *Maxwell v. Sumner*, 673 F.2d 1031, 1034 n.1 (9th Cir.), *cert. denied*, 459 U.S. 976 (1982), ruled against the state on the exhaustion issue and ordered it to answer on the merits. After the state did so, the district court denied McGuire's petition on July 15, 1987. It held that the admission of the evidence of the prior injuries to the child, and a jury instruction relating to that evidence, was proper under California evidence rules. The court also found that the evidence was relevant to contradict a pretrial statement made by McGuire, and offered at trial by the prosecution, that the baby's injuries were caused by her falling off a couch. The court also rejected McGuire's fifth amendment prosecutorial misconduct and denial of discovery claims. McGuire timely appealed. We have jurisdiction under 28 U.S.C. § 1291.

I. *Exhaustion*

28 U.S.C. § 2254(b) states: "An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted

the remedies available in the courts of the State. . . ." On direct appeal to the California appellate court, McGuire raised four issues: (1) admission of evidence of prior injuries to the baby and an errant "other crimes" instruction, (2) a fifth amendment claim that the original trial court erroneously admitted evidence of a statement made to the police that "some Mexicans" might have come into his home and presumably injured the baby, (3) a second fifth amendment claim relating to statements he made to the police without *Miranda* warnings the day before he was arrested, and (4) a prosecutorial misconduct claim. In his petition to the California Supreme Court, McGuire raised only the issues of the evidence of prior injuries and the "Mexican intruder" statement. The California Supreme Court denied his petition without a hearing, comment, or citation. In his petition for habeas corpus, however, McGuire raised all four claims that he had previously raised before the California appellate court.

A petition containing both exhausted and unexhausted claims must be dismissed by the federal courts. *Rose v. Lundy*, 455 U.S. 509, 510 (1982). Although McGuire presented only two of his four issues to the California Supreme Court, he has properly exhausted his state remedies. In *Maxwell*, we stated that:

> [I]f a claim has been briefed and argued before the [California] court of appeal, failure to assert it in the petition to the California Supreme Court does not normally waive the claim . . . [W]hen the California Supreme Court grants a hearing, its order effectively vacates the order of the court of appeal; the California Supreme Court then decides each issue in the case as if it were on original appeal from the trial court, "regardless of the grounds relied on in the petition."

Maxwell, 673 F.2d at 1034 n.1 (citations omitted).[1/] Thus we may reach the merits of McGuire's claims.

II. *Past Injuries.*

This court reviews the district court's denial of a petition for a writ of habeas corpus de novo. *Weygandt v. Ducharme*, 774 F.2d 1491, 1492 (9th Cir. 1985). A state prisoner is entitled to relief under 28 U.S.C. § 2254 only if he is held in violation of the Constitution or laws of the United States. *Engle v. Isaac*, 456 U.S. 107, 119 (1982); 28 U.S.C. § 2254(a). McGuire

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1. The *Maxwell* "rule" will no longer be effective for petitions presented to the California Supreme Court after March 6, 1985. On that date new California Supreme Court appellate rules came into effect. Presently, the California rules provide that "[o]nly the issues set forth in the petition and answer or fairly included in them need be considered by the court." Cal. Rules Sup. Ct. & Cts. of Appeal 28(e)(2) and Advisory Committee Comment, ¶ 4. The present case, however, is governed by *Maxwell*. The appellant filed his petition for hearing on February 26, 1985, before the effective date of the new California rules.

contends that admission of evidence of the baby's prior injuries, coupled with a jury instruction that allowed the jury to infer that if he committed the prior offenses he committed the charged crime, deprived him of due process. An erroneous evidentiary ruling will not cause a writ to issue unless a specific constitutional guarantee has been violated or the error is of such magnitude that the result is a denial of fundamental fairness. *United States v. DeRobertis*, 738 F.2d 168, 170 (7th Cir.), *cert. denied*, 469 U.S. 924 (1984). Before a federal court may overturn a state court conviction based on an incorrect or erroneous jury instruction, "it must be established not merely that the instruction is undesirable, erroneous, or even 'universally condemned,' but that it violated some right which was guaranteed to the defendant by the Fourteenth Amendment." *Cupp v. Naughten*, 414 U.S. 141, 146 (1973). The erroneous jury instruction must have rendered the trial so fundamentally unfair as to have denied McGuire due process. *Ahlswede v. Wolff*, 720 F.2d 1108, 1111 (9th Cir. 1983) (per curiam), *cert. denied*, 469 U.S. 873 (1984).

At trial, the prosecution introduced evidence that the baby had been physically abused in the past. Some of this evidence also indicated possible sexual abuse. The evidence was admitted pursuant to California law allowing such evidence to show that a child was a victim of the "Battered Child Syndrome." "The syndrome means that a child has received repeated and/or serious injuries by non-

accidental means. . . ." *People v. Jackson*, 18 Cal.App.3d 504, 506, 95 Cal.Rptr. 919, 921 (1971); *see also People v. Steger*, 16 Cal.3d 539 549 n.4, 546 P.2d 665, 671 n.4, 128 Cal.Rptr. 161, 167 n.4 (1976). Proof of the syndrome "essentially means that the victim's injuries were not inflicted by accidental means. . . ." *Landeros v. Flood*, 17 Cal.3d 339, 409, 551 P.2d 389, 393, 131 Cal.Rptr. 69, 73 (1976). In other words, proof of the syndrome demonstrates that a child has suffered repeated injuries over a period of time. These cases demonstrate that the California courts have been careful to limit proof of the syndrome to show that the child had not accidentally suffered the injuries. The additional finding that the injuries were probably caused by a particular person may not be made simply on the basis of proof of the syndrome itself. *See Jackson*, 18 Cal.App.3d at 507, 95 Cal.Rptr. at 921.

Jackson and *Landeros* make clear that proof of the syndrome does not prove who caused the injuries. That fact, though it may be inferred from proof of who was in contact with or cared for the child, is separate and distinct from proof of the syndrome itself. *Id.* In the case at bar, no one claimed that the child died accidentally. The *prosecution* introduced McGuire's pretrial statement that the injuries that killed the baby might have been caused by her falling off the couch. McGuire's defense at trial was not predicated on this or any other proof of accident. Rather, he attempted to prove that his wife had killed the

baby. The undisputed evidence of the massive injuries to the baby overwhelmingly refuted any inference of accidental death. The only permissible proposition this evidence could prove was whether the baby had suffered accidental or intentional injuries. This proposition was not at issue in this case. Thus, the probative value of the evidence of these prior injuries was negligible.

In addition, the prejudicial nature of this evidence was inherently great. *Cf. DeRobertis*, 738 F.2d at 171 (in a due process analysis of questioned evidence, the issue is whether the probative value of the evidence outweighs the prejudice to the accused). Proof of prior injuries to a small baby, coupled with the sexual nature of some of the injuries, inevitably prejudices McGuire. More significantly, there was little proof that McGuire was responsible for these injuries. It is certainly logical to infer that the primary care givers of the baby hurt and sexually molested the child on some prior date. The jury, however, was presented with no direct proof of whether McGuire or his wife caused these prior injuries. Either could have been responsible. One possibility, however, had been foreclosed by the prosecution. By offering the wife immunity, the jury was left with only one option -- to find McGuire guilty of the murder. Proof of the prior injuries, not necessary to prove that the baby's death was purposeful, could only have further prejudiced McGuire in front of the jury.

The prejudicial quality of the evidence was exacerbated by an instruction given to the jury. The trial court instructed the jury on the prior injury evidence as follows:

> Evidence has been introduced for the purpose of showing that the defendant committed acts similar to those constituting a crime other than that for which he is on trial. . . . Such evidence was received and may be considered by you only for the limited purpose of determining if it tends to show
>
> . . .
>
> a connection between the other two offenses and the one of which the defendant is accused, so that it may be logically concluded that if the defendant committed the other offenses, he also committed the crime charged in the case.

This instruction specifically told the jury that if it thought McGuire committed the other two "offenses" they could find him guilty of the charged offense. The instruction alone would probably constitute error of constitutional dimension. *See Butcher v. Marquez*, 758 F.2d 373, 378 (9th Cir. 1985); *United States v. Winters*, 729 F.2d 602, 604 (9th Cir. 1984). Certainly, coupled with the inherent prejudicial quality of the evidence itself, the error was of such magnitude to deny McGuire a fundamentally fair trial. We hold that McGuire was denied due process by

admission of this evidence and its associated jury instruction.[2/]

CONCLUSION

We are troubled that our disposition does not do justice in this case. A baby has been killed. Only the father and mother had access to the baby. One or the other, or perhaps both, are responsible for the death. This appeal, however, only concerns McGuire. Perhaps the state authorities should examine whether the mother fraudulently negotiated her grant of immunity, and if so, whether the immunity can be withdrawn. We express no opinion as to whether the evidence justifies a retrial of McGuire, his wife, or both, for murder.

We REVERSE the district court's denial of McGuire's petition for a writ of habeas corpus. We REMAND to the district court for the grant of a conditional writ. The state is permitted 90 days from this remand to refile.

REVERSED AND REMANDED.

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2. Given our disposition of this case, we do not reach or decide the appellant's *Miranda* claim.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARK OWEN McGUIRE,	
Petitioner-Appellant,	**No. 87-2522**
vs.	**D.C. No. C-85-6521 TEH**
WAYNE ESTELLE, Superintendent, California Men's Colony at San Luis Obispo,	**Filed May 19, 1989**
Respondent-Appellee.	

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

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UNITED STATES COURT OF APPEALS
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PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

INTRODUCTION

In an opinion filed on May 8, 1989, a panel of this Court reversed the District Court's order denying a petition for writ of habeas corpus, and ordered the State of California to grant petitioner a new trial. This petition for rehearing and suggestion for rehearing en banc is filed within 14 days, as required by Federal Rules of Appellate Procedure [FRAP] 40.

Respondent believes that a rehearing is necessary in order to address material points of fact and law overlooked in the decision. Specifically, the panel relied upon an interpretation of the evidence on other injuries to

the six-month old murder victim which is both unsupported by the record and never argued by petitioner in this proceeding or in any state court. The panel only discusses a portion of the limiting instruction relating to this evidence. Next, we note that the panel failed to discuss cited authority permitting the admission of other crimes evidence in child-killing cases, some of it from the Circuit. Finally, the panel opined that the prosecutor's grant of immunity to petitioner's wife was "questionable." That action was never objected to by petitioner in any proceeding; it was entirely inappropriate for the panel to consider it.

The panel also concluded that petitioner had adequately exhausted his state remedies, even though he had not presented certain of the issues raised to the California Supreme Court. A recent opinion of the United States Supreme Court, filed after this case was submitted but before it was decided, requires reconsideration of that holding and the precedent from this Circuit upon which it was based.

Respondent additionally suggests, pursuant to FRAP 35, that rehearing en banc is appropriate for two reasons. First, it is necessary to secure uniformity of decision within the Circuit. Other panels have recognized the admissibility of prior child abuse evidence in federal prosecutions; state court authorities and prosecutions should be evaluated similarly. Second, the question of

when issues are viewed as exhausted by this Court is of critical importance to the State of California.

ARGUMENT

I.

FAILURE TO EARLIER PRESENT ISSUES RAISED IN HIS PETITION FOR HABEAS CORPUS TO THE CALIFORNIA SUPREME COURT IN HIS DISCRETIONARY PETITION FOR HEARING REQUIRES DISMISSAL OF THE PETITION FOR FAILURE TO EXHAUST STATE REMEDIES.

As did the District Court, the panel rejected respondent's argument that petitioner failed to exhaust state remedies with respect to two of the issues raised in his petition for writ of habeas corpus. It is conceded that petitioner raised all of his issues in the California Court of Appeal, but it is asserted that he presented only two of them in a petition for hearing to the California Supreme Court. The panel concluded, relying on *Maxwell v. Sumner*, 873 F.2d 1031 (9th Cir. 1982), that presentation of any issue in the hearing petition was sufficient to exhaust all issues under the state court's former rules of procedure. Slip opn. at 4832-4833. We submit that *Maxwell* should be reconsidered in light of the recent decision of the United States Supreme Court in *Castille v. Peoples*, ___ U.S. ___, 109 S.Ct. 1056 (1989).

In *Maxwell*, this Court concluded that it was unnecessary for a defendant to specifically raise an issue in a petition for hearing to the California Supreme Court so long as it was raised in the California Court of Appeal. Since a grant of review under the procedure applicable to petitioner's case, see slip opinion at 4833-4834, n. 1, vacated the lower court opinion, issues not raised in the petition were not waived for purposes of later consideration by the Supreme Court. This Court recognized that the "purpose of a petition for a hearing in the California Supreme Court is to convince that court to exercise its *discretion* to hear the case." 673 F.2d at 1034, n. 1 (emphasis added).

The issue in *Castille*, *supra*, was the significance for federal exhaustion purposes of the denial of a petition for allocatur by the Pennsylvania Supreme Court. Under Pennsylvania law, such review is not a matter of right but depends on an exercise of sound judicial discretion. 109 S.Ct. at 1058. The Supreme Court concluded that denial of a request for discretionary review does not, in and of itself, constitute fair presentation of an issue to the state court for federal exhaustion purposes. 109 S.Ct. at 1060. This holding is particularly significant in petitioner's case.

The Supreme Court has required that, in order to be exhausted, an issue be "fairly presented" to the state court in the same manner that it is raised in the federal habeas corpus petition. *Castille*, *supra*, 109 S.Ct. at 1060;

Picard v. Connor, 404 U.S. 270, 275 (1971). The same legal theory and underlying facts must be presented. *Gibson v. Scheidemantel*, 805 F.2d 135, 138 (3rd Cir. 1986). For example, a claim that the state trial court abused its discretion in applying a state rule of criminal procedure is "entirely different" from an argument challenging the constitutionality of that rule as applied in the circumstances of a particular case. State courts must be allowed to consider the implications of a constitutional attack. *Boggs v. Evitts*, 818 F.2d 534, 536 (6th Cir. 1987).

In this case, petitioner not only failed to argue to the state courts that other crimes evidence issue raised a federal constitutional claim, he did not present two of the issues in the habeas corpus petition *at all* to the California Supreme Court. If, as *Castille* holds, denial of discretionary review does not constitute exhaustion, failure to even present the issue to such review must be viewed as inadequate. The fact that grant of hearing would ultimately have allowed all of the California Court of Appeal issues to be argued is irrelevant; it is impossible to know whether the California Supreme Court would have found the omitted issues provided more compelling reasons to grant review, even if those actually presented did not. Respondent submits that the *Maxwell* view (for exhaustion purposes) of prior California procedure cannot survive the holding in *Castille*.

The fact that the issue upon which this Court reversed the state court murder conviction was presented

to the California Supreme Court is not significant, even assuming that the form of its presentation was adequate exhaustion. This Court has "read *Rose v. Lundy* [455 U.S 509 (1982)] as requiring dismissal of the entire petition without reaching the merits of any of its claims where exhausted and unexhausted claims are combined. [Citations omitted]. The Supreme Court's direction to dismiss such 'mixed petitions' is clear and unequivocal, and leaves no discretion to consider hypothetically the claims which had been exhausted." *Szeto v. Rushen*, 709 F.2d 1340, 1341 (9th Cir. 1983). Because other claims remained unexhausted, the District Court (and thus, the panel) should have dismissed the entire petition.

Respondent urges this Court to grant rehearing in light of *Castille*. Given the significance of that decision and its impact on the circuit's view of California procedure, rehearing en banc is appropriate.

II.

THE PANEL'S HOLDING THAT IT WAS ERROR TO INTRODUCE EVIDENCE DEMONSTRATING PRIOR INCIDENTS OF CHILD ABUSE IGNORES THE FACTS IN THE CASE, RELIES UPON AN INCOMPLETE ANALYSIS OF THE LIMITING INSTRUCTION, AND OVERLOOKS FEDERAL AUTHORITY RECOGNIZING THE ADMISSIBILITY OF SUCH EVIDENCE.

The panel concluded that petitioner was prejudiced by the admission of evidence demonstrating prior acts of child abuse and by a jury instruction relating to the evidence. The decision is factually and legally inaccurate and should be reconsidered, for several reasons.

The panel referred more than once to evidence that Tori, the six-month old victim, had suffered "sexual abuse." Slip opn. at 4835. Respondent assumes this is a reference to evidence that she had sustained damage to her anus. There was *never* any suggestion, either by the prosecutor in argument or in any of the testimony presented by the state, that the injury was sexual in nature. Moreover, Daisy McGuire, defendant's wife and the child's mother, testified that she had pulled down on Tory's bowels a week or two before the child was killed because she was

having trouble defecating. RT 406.[1] There is no basis in the record for concluding that the jury viewed this evidence as demonstrating sexual abuse of the child.

The panel also asserted that the prior abuse evidence was only marginally relevant, because petitioner did not claim at trial that Tori's death was accidental. It expressly criticized the prosecutor's decision to introduce petitioner's statements to the police (in which he offered an accident defense), then impeach those assertions with the evidence of "Battered Child Syndrome." Slip opn. at 4835. The criticism ignores the fact that the prosecutor was obligated to prove death by a criminal agency; it suggests no federal constitutional prohibition against demonstrating the falsity of petitioner's statements to the police. California law specifically authorizes the prosecutor to introduce such evidence to show consciousness of guilt. *People v. McDowell*, 234 Cal.App.2d 54, 56-57 (1965). Federal courts have also recognized that it is appropriate to anticipate and counter defenses by use of other crimes evidence in the prosecutor's case-in-chief. *United States v. Lewis*, 759 F.2d 1316, 1349, n. 14 (8th Cir. 1985); *United States v. Evans*, 697 F.2d 240, 248, n. 8 (8th Cir., 1983). Petitioner should not be allowed to profit by his lies to the police, simply because he abandoned his first line of defense. The fact that he lied was relevant and probative

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1. RT refers to the transcript of the state court proceedings, all of which were lodged by Respondent with the District Court.

evidence which the prosecutor was entitled to present to the jury.

The panel then found that the error in admitting the other crimes evidence was exacerbated by the trial court's limiting instruction. It concluded that, standing alone, the instruction would "probably" constitute error of constitutional dimension. Slip opn. at 4837. This is not the test. Rather, it must be specifically shown that the instruction so infected the entire trial that the conviction violated due process. *Cupp v. Naughton*, 414 U.S. 141, 147 (1973); *Quigg v. Crist*, 616 F.2d 1107, 1111 (9th Cir. 1980).

More disquietingly, the panel quoted only a portion of the instruction. The jury was specifically advised that other crimes evidence was not intended to show bad character or criminal disposition,[2/] a limitation which this Court found to be significant in *Butcher v. Marquez*, 758 F.2d 373, 378 (9th Cir. 1985). *Butcher* was one of the cases cited in the panel opinion. Slip opn. at 4837. As this Court recognized in *United States v. Winters*, 729 F.2d 612, 614 (9th Cir. 1984) (the other case cited in the panel opinion), it must be assumed that the jury followed the

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. 2. The panel excised the following admonition in its discussion of the instruction: "Such evidence if believed, was not received, and may not be considered by you to prove that he is a person of bad character or that he has a disposition to commit crimes." CT 756-757. It is fundamental that the jury instructions must be considered as a whole. *Francis v. Franklin*, 471 U.S. 307, 315 (1981).

limiting instructions. *See also*, *Parker v. Randolph*, 442 U.S. 62, 73 (1979).

To the extent that the instruction would permit an inference of guilt based on the prior incidents of child abuse, such an inference is expressly permitted by the federal courts in infanticide or child abuse cases. *See, e.g., United States v. Woods*, 484 F.2d 127, 133 (4 Cir. 1973); *United States v. Harris*, 661 F.2d 138, 142 (10 Cir. 1981); *United States v. Leight*, 818 F.2d 1297, 1304 (7th Cir. 1987). This Court has followed *Woods* in a federal prosecution. *United States v. Lewis*, 837 F.2d 415, 419 (9th Cir. 1988) (evidence of prior child abuse was admissible because of its "probative value in disproving claims that the defendant lacked intent or that the child died by accident"). The state prosecutor in this case had precisely the same interest. The panel's failure to consider any of the federal authority cited to it by respondent compels reconsideration. The blunt fact is that neither admission of the evidence, nor giving of the instruction, nor both, denied petitioner due process.

III.

THE PANEL'S OPPOSITION TO THE STATE'S DECISION TO GRANT IMMUNITY TO PETITIONER'S WIFE IS AN IMPROPER BASIS UPON WHICH TO GRANT THE PETITION.

In its conclusion, the panel expressed an undisguised distaste over the prosecutor's decision to grant Daisy McGuire immunity from prosecution, and even suggested that the state reexamine that decision and possibly withdraw the immunity. Slip opn. at 4837. Those observations were entirely inappropriate.

First, there was never any objection, in any court, by petitioner to the grant of immunity. Indeed, under California law, he had no standing to object. *People v. Randolph*, 4 Cal.App.3d 655, 660 (1970). The same rule obtains in federal prosecutions. *United States v. Ellis*, 595 F.2d 159, 163 (3rd Cir. 1979.)

Second, federal courts have "no supervisory authority" over state judicial proceedings. *Smith v. Phillips*, 455 U.S. 209, 221 (1982). Even in a federal prosecution, the decision to grant or deny immunity belongs exclusively to the executive branch. *United States v. Mendia*, 731 F.2d 1412, 1414 (9th Cir. 1984); *Snelling v. United States*, 719 F.2d 1067, 1068, n. 3 (10 Cir. 1983).

Finally, the Court's implied criticism, that the prosecutor may have let the guilty party go free, ignores

a substantial amount of contrary evidence: (1) the testimony of a woman in the hospital waiting room who heard Mrs. McGuire ask petitioner what had "really happened" to Tori while she was in his exclusive custody, RT 174-149; (2) Mrs. McGuire's complaints to neighbors and friends about the way petitioner treated Tori, RT 470, 496, 498; (3) the testimony of a neighbor who saw petitioner pinch Tori's face while forcing food into her mouth, RT 469-470; and (4) Mrs. McGuire's attempt to exonerate petitioner from the stand, despite inconsistencies with her prior statements and the grant of immunity. RT 342, 348. In short, there was substantial evidence of petitioner's guilt, and the jury was fully aware of his wife's status in the case and her efforts to assist him. Because the panel impermissibly relied upon the immunity grant as a basis for reversing the conviction, this Court should grant a rehearing.

CONCLUSION

For the reasons stated above, respondent respectfully submits that a rehearing or rehearing en banc should be granted.

DATED: May 19, 1989

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARK OWEN McGUIRE, Plaintiff-Appellant, v. WAYNE ESTELLE, Warden, Defendant-Appellee.	No. 87-2522 D.C. No. CV-85-6521-TEH ORDER

Before: SCHROEDER and WIGGINS, Circuit Judges and
STEPHENS* District Judge

The opinion filed May 8, 1989 is withdrawn and is vacated.

SO ORDERED.

* Hon. Albert Lee Stephens, Jr., Senior United States District Judge for the Central District of California, sitting by designation.

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARK OWEN McGUIRE, Plintiff-Appellant, v. WAYNE ESTELLE, Warden, Defendant-Appellee.	)	No. 87-2522 D.C. No. CV-85-6521-TEH OPINION

Appeal from the United States District Court
for the Northern District of California
Thelton E. Henderson, District Judge, Presiding

Argued and Submitted June 14, 1988
San Francisco, California
Opinion filed May 8, 1989 and withdrawn April 23, 1990

Filed May 4, 1990

Before: Mary M. Schroeder and Charles Wiggins, Circuit Judges, and Albert Lee Stephens, Jr.*, District Judge.

Opinion by Judge Wiggins

*. Hon. Albert Lee Stephens, Jr., United States District Judge for the Central District of California, sitting by designation.

COUNSEL

Ann Hardgrove Vorhis, San Francisco, California, for the plaintiff-appellant.

Herbert F. Wilkinson, Supervising Deputy Attorney General, San Francisco, California, for the defendant-appellee.

OPINION

WIGGINS, Circuit Judge:

Mark McGuire ("McGuire") appeals from the district court's denial of his petition for a writ of habeas corpus under 28 U.S.C. § 2254(a). McGuire was convicted of second degree murder and is now serving a fifteen year to life sentence in a California state prison. McGuire contends that the admission of evidence of prior acts against him at his trial, coupled with an instruction that permitted the jury to consider those prior acts as evidence of his guilt of the crime charged, were errors that denied him due process of law under the Fourteenth Amendment. We find that his contention has merit and REVERSE.

FACTS AND PROCEEDINGS BELOW

Because a proper consideration of McGuire's due process claim requires weighing the prejudice to him of the error he alleges, we examine the trial testimony in some detail.

At about 9:00 p.m., on July 7, 1981, McGuire and his wife brought their six month old baby girl to the emergency room of a hospital in Hayward, California. The baby was bluish in color and was not breathing. The hospital staff were unable to save the baby and she was pronounced dead at about 9:45 p.m.

The father, McGuire, was charged with second degree murder of his child.

At trial, the prosecution called Dr. Levine, the doctor who examined the baby at the hospital. She testified that the child was essentially lifeless and without vital signs when she was brought into the hospital. The doctor also testified that the baby had a large and relatively recent bruise on the upper left chest area with multiple bruise marks around it, black and blue marks on her ears, and scar tissue indicating a healed tearing around the anus. Doctor Levine opined that the rectal tear was not caused by constipation or fecal impactment. She testified that such scarring probably resulted from the forceful insertion of a finger or some other foreign object. The doctor also testified that the baby had suffered from seven earlier rib fractures.

A different doctor performed an autopsy on the baby and testified that there were at least 17 contusions on the baby's chest and 29 more on her abdomen. He testified that his examination of the internal organs revealed that the liver was split in half, her pancreas was lacerated and split apart, her lower right lung and large vein from the heart were damaged, and part of her intestine was lacerated. The doctor also testified to rectal tearing at least six weeks old and to evidence of several partially healed rib fractures approximately seven weeks old.

McGuire made timely objection to all evidence of prior injuries as not being connected to him. The objections were overruled.

None of the foregoing evidence of injury to the child included evidence of who caused the injuries to her.

The prosecution also called a witness who had overheard McGuire talking to his wife in the emergency room of the hospital. The witness stated that McGuire's wife asked him "what really had happened?" and McGuire is reported to have responded that the baby had fallen from the couch.

A police officer was called by the prosecution. He testified that McGuire had told him that the child had fallen from the couch. The officer than told McGuire that the baby's injuries were inconsistent with a fall from the couch. McGuire thereupon responded that "maybe some Mexicans came in while I was upstairs."

McGuire's wife was next called as a witness by the prosecution. She was granted transactional immunity for her testimony although she had made no statement to the prosecutor prior to the trial. When asked about the circumstances of the baby's death, she testified that she, and not her husband, had beaten the baby. She gave a confused account of having struck the baby in the afternoon of July 7, 1981 and that the child did not move, cry, or cough thereafter.

McGuire's wife testified that on the afternoon of the 7th, after she struck the child, she left the house for about ten minutes and when she returned, the child was not breathing. She stated that she asked her husband what had happened and he said the child had fallen from the couch and struck the walker. She also testified that several weeks prior to the baby's death, she inserted her finger into the baby's rectum in an attempt to relieve her of constipation. She also testified to staying at a neighbor's house for four days prior to the 7th and had made inquiries about a battered woman's shelter.

The prosecution introduced evidence that a fall from a couch could not have produced the injuries causing the baby's death. The prosecution also introduced evidence that McGuire had treated the baby roughly in the past.

The defense countered with witnesses who testified they had never seen McGuire abuse the child. McGuire did not testify in his own defense.

On March 19, 1982, the jury returned a verdict of second degree murder against McGuire. On January 15, 1985, the California Court of Appeal affirmed his conviction. McGuire petitioned for a hearing before the California Supreme Court. On March 21, 1985, the California Supreme Court issued a "postcard denial" of the petition. It did so without any citation or comment.

On August 30, 1985, McGuire filed a petition for writ of habeas corpus in federal district court under 28 U.S.C. § 2254(a). Order to show cause issued on February 26, 1986. In its original response, the state of California did not answer on the merits but argued that McGuire had failed to exhaust his state remedies. The district court, relying on *Maxwell v. Sumner*, 673 F.2d 1031, 1034 n.1 (9th Cir.), *cert. denied*, 459 U.S. 976 (1982), ruled against the state on the exhaustion issue and ordered it to answer on the merits. After the state did so, the district court denied McGuire's petition on July 15, 1987. It held that the admission of the evidence of the prior injuries to the child, and a jury instruction relating to that evidence, was proper under California evidence rules. The court also found that the evidence was relevant to contradict a pretrial statement made by McGuire, and offered at trial by the prosecution, that the baby's injuries were caused by her falling off a couch. The court also rejected McGuire's fifth amendment prosecutorial misconduct and denial of discovery claims. McGuire timely appealed. We have jurisdiction under 28 U.S.C. § 1291.

I. EXHAUSTION

28 U.S.C. § 2254(b) states: "An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State. . . ." On direct appeal to the California appellate court, McGuire raised four issues: (1) admission of evidence of prior injuries to the baby and an errant "other crimes" instruction, (2) a fifth amendment claim that the original trial court erroneously admitted evidence of a statement made to the police that "some Mexicans" might have come into his home and presumably injured the baby, (3) a second fifth amendment claim relating to statements he made to the police without *Miranda* warnings the day before he was arrested, and (4) a prosecutorial misconduct claim. In his petition to the California Supreme Court, McGuire raised only the issues of the evidence of prior injuries and the "Mexican intruder" statement. The California Supreme Court denied his petition without a hearing, comment, or citation. In his petition for habeas corpus, however, McGuire raised all four claims that he had previously raised before the California appellate court.

A petition containing both exhausted and unexhausted claims must be dismissed by the federal courts. *Rose v. Lundy*, 455 U.S. 509, 510 (1982). Although McGuire presented only two of his four issues to the California

Supreme Court, he has properly exhausted his state remedies. In *Maxwell*, we stated that:

> [I]f a claim has been briefed and argued before the [California] court of appeal, failure to assert it in the petition to the California Supreme Court does not normally waive the claim . . . [W]hen the California Supreme Court grants a hearing, its order effectively vacates the order of the court of appeal; the California Supreme Court then decides each issue in the case as if it were on original appeal from the trial court, "regardless of the grounds relied on in the petition."

Maxwell, 673 F.2d at 1034 n.1 (citations omitted).[1] Thus we may reach the merits of McGuire's claims.

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1. The *Maxwell* "rule" will no longer be effective for petitions presented to the California Supreme Court after March 6, 1985. On that date new California Supreme Court appellate rules came into effect. Presently, the California rules provide that "[o]nly the issues set forth in the petition and answer or fairly included in them need be considered by the court." Cal. Rules Sup. Ct. & Cts. of Appeal 28(e)(2) and Advisory Committee Comment, ¶ 4. The present case, however, is governed by *Maxwell*. The appellant filed his petition for hearing on February 26, 1985, before the effective date of the new California rules.

II. THE CONSTITUTIONALITY OF APPELLANT'S CONVICTION

We review the district court's denial of a petition for a writ of habeas corpus de novo. *Weygandt v. Ducharme*, 774 F.2d 1491, 1492 (9th Cir. 1985). A state prisoner is entitled to habeas relief only if he is held in violation of the constitution, laws, or treaties of the United States. *Engle v. Isaac*, 456 U.S. 107, 119 (1982); 28 U.S.C. § 2254(a). McGuire contends that the procedures used to convict him in state court violated his fourteenth amendment right to due process. U.S. Const. Amend. XIV. We agree.

A claim for deprivation of due process will succeed only if the trial court's errors rendered the trial arbitrary or fundamentally unfair. *Pennywell v. Rushen*, 705 F.2d 355, 357 (9th Cir. 1983). In the instant case we find that the aggregate effect of the admittance of irrelevant, highly prejudicial evidence, compounded by the trial court's instruction to use that evidence in the most prejudicial manner possible, rendered appellant's trial arbitrary and fundamentally unfair.

A. THE ADMITTANCE OF IRRELEVANT, PREJUDICIAL EVIDENCE

The trial court admitted extensive evidence of prior physical abuse the baby had suffered, including evidence of possible sexual abuse. However, that evidence has no

relevance to appellant because the prosecution did not establish that appellant inflicted those injuries.

In order for evidence to be relevant, it must have some probative value. *See, e.g.,* Fed.R.Evid. 401 (evidence to be relevant must make the determination of the action more probable or less probable than it would be without the evidence). Evidence cannot have probative value unless a party connects it to the defendant in some meaningful way. *See, e.g., United States v. Hooten*, 662 F.2d 628, 635 (9th Cir. 1981), *cert. denied*, 455 U.S. 1004 (1982) (in order for prior act evidence to be admissible under the Fed.R.Evid. it must be "similar and close enough in time to be relevant"); *People v. Rivera*, 41 Cal.3d 388, 392, 710 P.2d 362, 364, 221 Cal.Rptr. 562, 564 (1985) (in bank) ("In order for evidence of a prior [act] to have a tendency to prove the defendant's identity as the perpetrator of the charged offense, the [prior act and the charged offense] must have enough shared characteristics to raise a strong inference that they were committed by the same person. . . . It is not enough that the two acts contain common marks.").

In the instant case, the prosecution made no such connection. The prosecution elicited evidence that McGuire was rough with the baby, and that on one occasion McGuire had squeezed the baby's cheeks. Daisy McGuire also stated that she feared leaving the baby alone with McGuire. We recognize the temptation to find that such evidence is enough to infer that McGuire caused

the prior rectal tearing and the broken ribs. However, we cannot permit a jury that temptation. Evidence of McGuire's petty meanness does not establish that he committed, or is even capable of, the extensive physical abuse inflicted on the child. It is precisely because anyone, including Daisy McGuire, could have inflicted those injuries that makes the prior injury evidence irrelevant.

We emphasize that the trial court's error was not simply that it admitted the prior evidence under the wrong evidentiary theory. Nor do we dispute that there are constitutionally permissible uses for admitting evidence of prior bad acts. *See* Fed.R.Evid 404(b) (evidence of other crimes, wrongs or acts may be admissible to prove motive, opportunity, intent, preparation, plan, knowledge identity, or absence of mistake or accident); ***United States v. Lewis***, 837 F.2d 415, 418-419 (9th Cir.), *cert. denied*, 109 S.Ct. 304 (1988) (evidence of prior child abuse properly admitted to show intent). However, acts which the prosecution did not connect to appellant cannot be characterized as *his* prior acts.

Furthermore, we find the introduction of such prior injury evidence highly prejudicial. The prosecution introduced evidence of prior injuries to the baby to establish that appellant was a child abuser, and for no other purpose, in a murder trial for the death of his child. The trial court incorrectly admitted the evidence pursuant to California law allowing past injury evidence to establish

the "Battered Child Syndrome." The Battered Child Syndrome allows proof of past injuries to prove the child's present injuries did not occur accidentally. *See People v. Jackson*, 18 Cal.App.3d 504, 506, 95 Cal.Rptr. 919, 921 (1971); *Landeros v. Flood*, 17 Cal.3d 399, 409, 551 P.2d 389, 393, 131 Cal.Rptr. 69, 73 (1976).

However, in the instant case, no claim was made that the child died accidentally. The prosecution attempted to prove Mark McGuire deliberately did it. The defense attempted to prove Daisy McGuire deliberately did it. Although the prosecution did not succeed in proving that the appellant caused the prior injuries, we cannot ignore that a trial of the grisly murder of an innocent baby implicates highly charged emotions. The unproven characterization of appellant as a child abuser maximized the prejudice flowing from the irrelevant evidence. *See Dudley v. Duckworth*, 854 F.2d 967 (7th Cir. 1988) (granting habeas relief where prejudicial effect of evidence so outweighed probative value that result was a denial of fundamental fairness); *Osborne v. Wainwright*, 720 F.2d 1237 (11th Cir. 1983) (reversing and remanding a denial of habeas corpus petition on basis that prejudicial effect of evidence might have risen to such magnitude as to deny fundamental fairness); *Bisaccia v. Attorney General of State of New Jersey*, 623 F.2d 307 (3d Cir. 1980) (same).

B. IMPROPER JURY INSTRUCTIONS

The trial court did not merely admit irrelevant, highly prejudicial evidence without comment. The trial court *instructed* the jury to use that evidence in the most improper way possible. We assume that the jury followed its instructions. *Aspen Skiing Co. v. Aspen Highland Skiing Corp.*, 472 U.S. 585, 604 (1985). The trial court's jury instructions stated:

> Evidence has been introduced for the purpose of showing that the defendant committed acts similar to those constituting a crime other than that for which he is on trial. Such evidence, if believed, was not received, and may not be considered by you to prove that he is a person of bad character or that he had a disposition to commit crimes. Such evidence was received and may be considered by you only for the limited purpose of determining if it tends to show three things:
>
> 1. The impeachment of Daisy McGuire's testimony that she had no cause to be afraid of the defendant,
>
> 2. To establish the battered child syndrome, and
>
> 3. Also a connection between the other two offense (sic) and the one of which the defendant is accused *so that it may be logically concluded that if the defendant committed other offenses, he also committed the crime charged in the case.*
>
> You are not permitted to consider evidence for any other purpose.

(emphasis added).

Subsection 3 of the instruction is erroneous.[2/] It permits the jury to make a direct determination of guilt by concluding that appellant committed prior bad acts. The rejection of such use of circumstantial character evidence in criminal cases has become "so deeply imbedded in our jurisprudence as to assume almost constitutional proportions. . . ." Fed.R.Evid. 404(a) advisory committee's note.

Not only have we never condoned an instruction which permits a finding of guilt based on a conclusion that the appellant committed prior bad acts, we have consistently stressed the importance of a *limiting* instruction to confine the use of prior bad act evidence to the proper purpose for which the court admitted it. *See United States v. Green*, 648 F.2d 587, 593 (9th Cir. 1981) (admission of bad act evidence in conjunction with failure of trial judge to provide limiting instruction following admission of bad act evidence required reversal); *cf. Butcher v. Marquez*, 758 F.2d 373, 378 (9th Cir. 1985) (no

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2. It appears that the trial court's erroneous instruction was the result of an incorrect reading of CALJIC 2.50 (1979 Revision). This standard jury instruction has been clarified to avoid the misunderstanding which occurred here. *See* CALJIC 2.50 (1987 Revision).

due process violation resulted from wrongful admission of prejudicial evidence where instructions limited use of that evidence to find intent); *United States v. McCown*, 711 F.2d 1441, 1454 (9th Cir. 1983) (no due process violation resulted from admission of prior bad acts evidence where prejudice was minimal and trial judge offered to give a limiting instruction).

The damage done by subsection 3 is not limited by a qualifying instruction by the court. Nor is subsection 3 limited by the preceding subsections of the instruction. The first subsection simply warned the jury not to use the evidence of prior bad acts to find that McGuire was a bad person and therefore infer that McGuire was likely to have committed this crime. Subsection 3, however, informed the jury that it may find McGuire guilty of the offense charged if it logically concluded that he committed the other earlier offenses. For these reasons, the faulty instruction considered along with the admittance of the prejudicial evidence "so infected the entire trial that the resulting conviction violate[d] due process." *Cupp v. Naughten*, 414 U.S. 141, 147 (1973). Nor do we believe that this error can be considered harmless beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 18, 24 (1967). Although there was evidence suggesting McGuire's guilt, this evidence was certainly not overwhelming. *See Dudley v. Duckworth*, 854 F.2d 967, 972 (7th Cir. 1988) (error not harmless even when

evidence of petitioner's guilt was "impressive but not overwhelming.").

III. CONCLUSION

We find that the jury instruction which permitted the direct determination of guilt from evidence of prior injuries not connected to McGuire denied him due process. The severity of these errors sets this case apart from arguably similar cases in which we rejected claims that evidentiary error rendered a trial fundamentally unfair. For example, in *Lewis*, we found no due process error where the trial court admitted evidence of prior child abuse in a defendant's trial for the murder of his son. 837 F.2d at 418-19. However, *Lewis* suffered from neither of the errors we find determinative in the instant case. In *Lewis*, the testimony of two witnesses connected the defendant to the infliction of the prior injuries, and the trial court provided a limiting instruction. *Id.*, at 419.

Because the prejudicial effect of the errors discussed above amount to a denial of due process, we grant McGuire's habeas petition. However, we are also not blind to the fact that apart from those errors, only the barest threads connect McGuire to the crime. True, given the pattern of most child abuse cases, it is not unreasonable to assume that one or both of the baby's primary care givers were responsible for the baby's injuries and death. We are also mindful that in the emergency

room, McGuire answered unconvincingly in response to Daisy McGuire's accusation that McGuire bore responsibility for the baby's injuries leading to death. And evidence existed that McGuire had treated his wife and the baby roughly in the past. But these are mere shadows of guilt which leave ample room for reasonable doubt. Due process requires more than a simple intuitive feeling that the father may be guilty. It requires convincing proof.

We REVERSE and REMAND for a new trial.

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARK OWEN McGUIRE, Plaintiff-Appellant, v. WAYNE ESTELLE, Warden, Defendant-Appellee.	No. 87-2522 D.C. No. CV-85-6521-TEH ORDER AND DISSENT

Filed November 23, 1990

Before: Mary M. Schroeder and Charles Wiggins, Circuit Judges, and Albert Lee Stephens, Jr.*/, District Judge.

ORDER

The panel has voted to deny the petition for rehearing and reject the suggestion for rehearing en banc. Judges Kozinski and Trott would grant the suggestion for rehearing en banc.

The full court has been advised of the suggestion for an en banc. An active judge requested a vote on whether to rehear the matter en banc. The request failed to

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*. Hon. Albert Lee Stephens, Jr., United States District Judge for the Central District of California, sitting by designation.

receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed.R.App.P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

DISSENT

KOZINSKI, Circuit Judge, with whom Circuit Judge TROTT joins, dissenting from the order rejecting the suggestion for rehearing en banc.

Six month old Tori McGuire died in a hospital emergency room, the victim of appalling internal injuries: her liver was split in half, her pancreas was lacerated and split apart, her lower right lung and the large vein from her heart were damaged, and part of her large intestine was lacerated. No, little Tori was not the victim of a hideous automobile accident; nor had she been extracted from the rubble of an earthquake. She had been beaten to death. Her lifeless body, with dozens of contusions on her chest and abdomen, was brought to the hospital by her parents who claimed they didn't know what could have happened to her. Perhaps, the father said, "the baby fell off the couch" or maybe "some Mexicans" broke in and abused her while he was out of the room. Not taken in by these transparent falsehoods, the state brought charges against the father, Mark McGuire. A state jury convicted him of second degree murder; the conviction was affirmed on appeal.

A panel of this court now overturns the conviction, quite possibly forever. In so doing, it not only reaches a result that is contrary to simple justice and common sense, but does so in a way that will seriously interfere with the authority and autonomy of the state courts in many other criminal proceedings. Most fundamentally, the panel overturns the state conviction because it disagrees with the state court on questions of *state* law.[1] Worse, the panel punishes the prosecution for introducing what the court deems to be unnecessary evidence of the defendant's intent, even though intent is clearly an element of the crime with which McGuire was charged. Finally, the panel misapplies the teachings of *Chapman v. California*, 386 U.S. 18 (1967), and *United States v. Hasting*, 461 U.S. 499 (1983), by failing to consider "the entire record prior to reversing a conviction for constitutional errors that may be harmless." *Id.* at 509 n. 7.

This opinion is markedly out of step with the law of the Supreme Court and this circuit governing these sensitive and important issues. While en banc procedures are cumbersome and time consuming, such considerations

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1. A similar concern was raised by *Blair v. McCarthy*, 881 F.2d 602 (9th Cir. 1989, *cert. granted*, 59 USLW 3210 (Oct 2. 1990)(No. 89-1862), vacated as moot and remanded ___ USLW ___ (1990), where the first question presented was: "Has court below improperly and unduly expanded scope of federal habeas corpus relief by granting such relief in absence of any federal violation on sole basis of alleged violation of state procedural rule plus finding that it is 'reasonably probable' that different result would have occurred in absence of state law error?"

ought not deter us from maintaining uniformity in the law of the circuit, as well as correcting an obvious miscarriage of justice. Because my colleagues' decision not to take this case en banc lets stand what I consider to be a wholly unacceptable precedent, I must respectfully dissent.

Discussion

Tori McGuire's short life was the type of horror no sentient being should have to endure. In addition to the ghastly injuries that caused her death, the doctors who examined her discovered some earlier injuries -- rectal tearing that was at least six weeks old and several partially healed rib fractures that were approximately seven weeks old. The prosecution introduced evidence of these earlier injuries, and the trial court instructed the jury as to the inferences it could draw therefrom. This evidence and these instructions lie at the heart of the panel's decision to overturn the conviction. A dispassionate review of the state court proceedings, however, reveals that no error at all was committed, much less an error of constitutional dimensions, and that the disputed evidence was, in any event, not prejudicial given the overwhelming evidence of McGuire's guilt.

A. *The Panel Second-Guessed The State Courts On Questions Of State Law*

This is not an appeal from a federal criminal conviction; it is a state habeas corpus case. Our function is limited to determining whether the petitioner's constitutional rights were violated. *Engle v. Isaac*, 456 U.S. 107, 119 (1982); *Oxborrow v. Eikenberry*, 877 F.2d 1395, 1400 (9th Cir.), *cert. denied*, 110 S.Ct. 344 (1989); *Middleton v. Cupp*, 768 F.2d 1083, 1085 (9th Cir. 1985), *cert. denied*, 478 U.S. 1021 (1986). In making that determination, we do not review issues of state law, such as evidentiary rulings; we are bound by the state courts' interpretations of the law entrusted to them. The panel disregards this limitation entirely and overturns Mark McGuire's conviction because it disagrees with the way the state court resolved questions of state law concerning the admissibility of evidence and the wording of jury instructions.

On the evidentiary question, the state trial court admitted proof of prior injuries for three separate reasons, one of them being that it tended to establish that Tori was a battered child, pursuant to a theory known as the "Battered Child Syndrome." The state court of appeal affirmed:

> [P]roof of Tori's "prior injuries" tending to establish the "battered child syndrome" was patently proper.

People v. McGuire, No. A017800, at 7 (Cal.App. Jan. 15, 1985), citing and discussing *People v. Bledsoe*, 36 Cal.3d 236 (1984); *People v. Jackson*, 18 Cal.App.3d 504 (1971); and *Landeros v. Flood*, 17 Cal.3d 399 (1976). Our panel flatly disagrees with this determination:

> The trial court incorrectly admitted the evidence *pursuant to California law* allowing past injury evidence to establish the "Battered Child Syndrome." The Battered Child Syndrome allows proof of past injuries to prove the child's present injuries did not occur accidentally. *See People v. Jackson*, 18 Cal.App.3d 504, 506, 95 Cal.Rptr. 919, 921 (1971); *Landeros v. Flood*, 17 Cal.3d 399, 409, 551 P.2d 389, 393, 131 Cal.Rptr. 69, 73 (1976).

901 F.2d at 754 (emphasis added).

What can one possibly say about this? The panel not only expressly states that the state court erroneously admitted the evidence "pursuant to California law," but it relies on two of the same cases that the state court of appeal relied on in reaching the opposite conclusion. Until reading the panel's opinion, I had thought the federal courts were bound by state court interpretations of the state rules of evidence. Apparently, however, the panel has now declared open season on state court evidentiary rulings in the Ninth Circuit.

The panel makes precisely the same mistake when it concludes that "[s]ubsection 3 of the [prior bad acts] instruction is erroneous." 902 F.2d at 755. The panel's only explanation for this conclusion appears in a footnote:

> It appears that the trial court's erroneous instruction was the result of an incorrect reading of CALJIC 2.50 (1979 Revision). This standard jury instruction has been clarified to avoid the misunderstanding which occurred here. *See* CALJIC 2.50 (1987 Revision).

Id. at 755 n. 2. Once again, the panel cites only state law in support of its conclusion that the state courts committed error.

The panel does ultimately conclude that "the faulty instruction considered along with the admittance of the prejudicial evidence 'so infected the entire trial that the resulting conviction violate[d] due process.'" 902 F.2d at 755 (quoting *Cupp v. Naughten*, 414 U.S. 141, 147 (1973)). This reference to the due process clause does not repair the damage done by the panel's earlier analysis. The problem is that, in order to conclude that there was a due process violation, one must first determine that the state trial court erred. The panel made that initial determination by relying almost exclusively on state law,

which it reads in a way directly contrary to the state court's reading.[2/]

B. *Evidence Of Intent Was Proper And Necessary*

In concluding that the evidence of prior injuries was improperly admitted, the panel suggests that the evidence was not relevant. *Id.* at 754. As discussed above, the panel had no business second-guessing the state courts on a question of state law. Having started down this path, however, the panel makes a collateral error, one with grave constitutional implications.

As the panel recognized, evidence is admitted pursuant to the Battered Child Syndrome theory to prove that the death was not accidental. *Id.* If the child has suffered a series of injuries as the result of child abuse, this tends to make it less likely that the injury in question resulted from a mishap. *People* v. *Jackson*, 18 Cal.3d 504, 507, 95 Cal.Rptr. 919, 921 (1971). The panel concludes that the evidence of prior injuries was irrelevant because

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2. I say *almost* exclusively because the court does sprinkle in citations to federal law, particularly the Federal Rules of Evidence. *See, for example,* 902 F.2d at 754 (citing FRE 404(b) and *United States v. Lewis*, 837 F.2d 415 (9th Cir.) *cert. denied*, 488 U.S. 923 (1988)); *Id.* at 755 (citing FRE 404(a) Advisory Committee note and *United States v. Green*, 648 F.2d 587, 594 (9th Cir. 1981)). The Federal Rules of Evidence, the Advisory Committee notes, and federal criminal cases are, of course, wholly irrelevant to a state habeas case, where the only issue is whether the trial violated constitutional norms. The panel's opinion in this case could well be construed as giving the Federal Rules of Evidence a constitutional cast. *See id.* at 755.

"in the instant case, no claim was made that the child died accidentally." *Id.* According to the panel, the only issue at trial was *who* killed Tori, not whether the killing was intentional.

This passage in the panel's opinion has serious implications: It suggests that due process may be violated by the admission of evidence which clearly goes to an element of the offense charged if it turns out that the defense does not put that particular element in issue. This reasoning, if it stands as the law of the circuit, will present state prosecutors with an intractable problem: Just how are they to know whether the defendant intends to put a particular element of the crime in issue? After all, the prosecution must go first and bears the burden of establishing every element of the crime beyond a reasonable doubt -- including, for second degree murder, malice aforethought, Cal. Penal Code §§ 187, 189 (West 1988). If the prosecution decides not to present proof of any element of the crime on the theory that the defense will not put that element in issue, the defendant automatically becomes entitled to a directed verdict of acquittal. James W. Moore and Jo D. Lucas, 5A *Moore's Federal Practice* ¶ 50.02[1] at 50-16.1 to 50-17 (2d ed. 1990). The simple reality is that, in a criminal case, *every* element of the crime is in issue; the defense is free to sit back and see how the prosecution's case shapes up, and then focus its attack where the prosecution is weakest.

The panel's insistence that intent was not an issue in the case is contradicted not only by elementary principles of criminal procedure, but by the record in this case as well. As the panel recognizes, McGuire at one time claimed that the baby was injured when she fell off the couch. 902 F.2d at 751. He later suggested that "maybe some Mexicans came in while I was upstairs." *Id.* How on earth was the prosecutor to know that McGuire would not raise one of these defenses when his turn came to put on evidence?"[3] More fundamentally, if the prosecutor decided to play it safe by introducing evidence in addition to the fatal injuries to prove that the death was not accidental, how can we say that the evidence was irrelevant? For the panel to look at the evidence after the case was closed and say that the prosecutor was too cautious in proving every element of the offense is nothing but 20/20 hindsight.[4]

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3. Indeed, early in the trial the prosecutor advised the court that he anticipated the defense would rely primarily on the "some Mexicans" theory, with "try[ing] to hang it on momma" a less likely alternative. Reporter's Transcript on Appeal, *People of the State of California v. McGuire*, H 3748 (RT) 213-24 (Book II).

4. As it turns out, the defense *did* raise the issue of intent, and very vigorously. Defense counsel objected to a jury instruction on second degree murder, stating "I don't think there is evidence of intent." RT 562 (Book V). She requested an involuntary manslaughter instruction, stating "my contention is that whoever killed the baby or hit the baby had no malice, had no intent to kill the baby." RT 619. With the agreement of both sides, the court instructed the jury that "[t]he unintentional killing of a human being is excusable and not unlawful when committed by accident," and that "[t]he burden is on the Prosecution to prove beyond a reasonable doubt that the homicide was not excusable." RT 762. During her closing argument, defense counsel argued that the prosecution had failed to establish intent: "Involuntary manslaughter . . . is an unlawful killing of a human being where there is no intent to kill and no malice. That is what we have here, if anything." RT 720. See also RT 718-19. In McGuire's motion for a new trial after the verdict came in, defense counsel asserted that the trial court had erroneously failed to instruct the jury on the requirement of specific intent. Clerk's Transcript on Appeal, *The People of the State of California v. McGuire*, H 3748 (CT) 155. Thus, while the panel appears to have labored under the misapprehension that McGuire had conceded or stipulated to intent, defense counsel was well aware of the state's burden of proof as to McGuire's state of mind, and pressed the issue forcefully.

What are state prosecutors in the Ninth Circuit supposed to do when presented with a situation such as that here? On the one hand, they face the possibility of a directed verdict or unfavorable jury instruction if they fail to prove an element of the case that somehow seems "obvious." On the other hand, under today's precedent, they face the possibility that a federal court -- with the benefit of hindsight -- will conclude that the evidence was not really necessary because that particular element of the crime was not contested by the defense. It is obvious that the McGuire prosecutor could not have guarded against this type of whipsaw; more troubling is that, even with today's precedent in hand, no prosecutor will know when to withhold evidence or when to include it until he sees the defendant's evidence, by which time it will be too late. In common parlance, this is known as a Catch-22.

C. ***Panel's Harmless Error Analysis Is Deficient***

It is well established that errors, even constitutional ones, do not warrant overturning a state conviction unless it is determined that the errors are not harmless. *Chapman v. California*, 386 U.S. 18-33 (1967). Except where the error is so fundamental that it is deemed harmful per se, which is not the case here, the federal court must examine the *entire* state court record to determine whether the jury would have reached a different conclusion absent the error. *United States v. Hasting*, 461 U.S. 499, 509 n. 7 (1983).

The panel here speaks the language of harmless error analysis but fails to perform the tasks associated therewith. The sum and substance of the panel's harmless error "analysis" is the following: "Although there was evidence suggesting McGuire's guilt, this evidence was certainly not overwhelming." 902 F.2d at 755. The panel does not state that it has reviewed, or even seen the state court record; it does not discuss the evidence supporting guilt; and it does not analyze how the trial would have played out had the perceived errors been eliminated. Harmless error analysis that is so utterly devoid of analysis is no better than no harmless error analysis at all. At a bare minimum, it seems to me, the panel must represent that it has ordered the state court record,

looked at it, and undertaken the type of review mandated by the Supreme Court.

Quite frankly, it is impossible to review the record in this case and understand how the panel reached its conclusion. Take, for example, the error perceived by the panel as to the admission of the evidence under the Battered Child Syndrome. Even if the panel were correct in concluding that the evidence was improperly admitted for this purpose, *it does not matter*. The trial court found the evidence of prior injuries admissible for three distinct purposes: (1) to establish the existence of Battered Child Syndrome; (2) to show that McGuire had committed similar prior bad acts;[5] and (3) to impeach Mrs. McGuire's testimony that Mr. McGuire was kind to his daughter. RT 573-75 (Book V), 757. The state court of appeal found the evidence admissible on the first of these grounds, and so did not reach the other two. *People v. McGuire*, No. A017800, at 5-7 (Cal.App. Jan. 15, 1985).

Where a trial court admits evidence for three independent reasons, and we find one of them insufficient,

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5. The trial court treated Battered Child Syndrome and prior bad acts as separate evidentiary categories; it may be more accurate to say that evidence of Battered Child Syndrome is a subset of evidence of prior bad acts. For our purposes it makes no difference: A finding that evidence is inadmissible to prove Battered Child Syndrome says nothing about whether the evidence may be admitted for the broader purpose of showing prior bad acts.

our job is hardly done.[6/] All evidence is admissible for some purposes but inadmissible for others; we could reverse convictions any time we liked were we to focus on one purpose exclusively. Here, the panel did not find the evidence was inadmissible on the other two grounds; therefore, it is bound to assume that the evidence would have been admitted in any event. In light of the indisputable record on this point, I fail to see how McGuire suffered *any* prejudice from the alleged error regarding admission of evidence of the Battered Child Syndrome, much less a denial of due process.

But there is more. Even were we to assume, with the panel, that admission of the evidence was prejudicial error, the panel was required to decide whether the jury would have convicted anyway. See *United States v. Hasting*, 461 U.S. at 510-11. A determination on this issue required the panel to weigh the prosecution's case, the likely effect of the wrongfully admitted evidence and the likelihood that the jury would have come to a different result. A review of the record leads only to one conclusion: The jury would have reached exactly the

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6. That the state court of appeal only considered one ground for admission is not, of course, dispositive. Having found the evidence admissible on one ground, the court of appeal had no need to examine whether the evidence was admissible on other grounds as well. To find the evidence inadmissible -- and so highly prejudicial as to constitute a due process violation -- we must make sure that it is not in fact admissible on *any* of the grounds relied on by the trial court.

same verdict regardless of the errors perceived by the panel.

First, the record discloses that the prosecution's case was very strong indeed. In weighing the strength of that evidence, it must be kept in mind that there were only two plausible theories of the case: that the father abused Tori or that the mother did; no one else had access to the baby immediately prior to her death. While the 1500 page trial transcript contains a good deal of testimony establishing that the father did it, perhaps the strongest piece of evidence is the testimony of several witnesses who overheard a conversation between Mr. and Mrs. McGuire at the hospital while the couple was waiting to learn Tori's fate:

> While Tori was being treated, and McGuire and his wife were seated together in a hospital waiting room, Mrs. McGuire several times insistently asked "what really happened?" McGuire replied that he "didn't know," and that he "guessed" the baby fell off the couch; his response was always the same. Finally Mrs. McGuire said, "You are responsible," to which he apparently made no reply.

People v. McGuire, No. A017800, at 3 (Cal.App. Jan. 15, 1985).

This conversation makes no sense at all unless it was the father who abused the baby. Had the baby been

alone with the mother at the time she suffered the injuries, as Mrs. McGuire claimed at trial, one would have expected the accusations at the hospital to point entirely the other way. Not only did McGuire fail to question or accuse his wife, he lamely suggested the baby "fell off the couch" and did not protest her accusation that "you are responsible." Short of a videotape of the crime, it's not clear what better evidence the prosecution might have presented.

The fact is, child abuse cases are inherently difficult to prove: the evidence is usually circumstantial and often ambiguous; eyewitnesses seldom come forward because of family considerations; and the victims often are dead or too young to speak. See, for example, *United States v. Boise*, No. 89-30071, slip op at 12157 (9th Cir. September 27, 1990). It is rare indeed to have a case like this one, where the defendant makes what is tantamount to a spontaneous confession of his guilt. When this conversation is viewed in the context of all the other evidence presented to the jury, see *People v. McGuire* at 2-4, one must conclude that the prosecution's case was extremely strong.

Second, the prejudice flowing from any error would have been minimal. If I understand the panel's rationale correctly, it is that the prosecution failed to sufficiently prove McGuire's connection to the earlier acts of child

abuse. Even if that were true -- which it clearly is not[7] -- how was the defendant prejudiced? Evidence of the earlier abuse could *only* harm the defendant to the extent the jury was convinced he committed those acts. If the jury was in doubt, or believed that someone else (for example, Mrs. McGuire) committed the bad acts, its outrage over them would not have been directed at Mark McGuire.

Finally, it is highly unlikely that, absent the error, the jury would have reached a not guilty verdict because to do so it would have had to adopt the defense's alternative theory -- that the mother did it. Mrs. McGuire's

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7. The record contains ample evidence from which a rational jury could conclude that McGuire had been the perpetrator of the earlier injuries:

> -- Mrs. McGuire's statements to Detective Gillis to the effect that, when she bathed Tori, she noticed the child had bruises on her body. When asked how Tori might have gotten those bruises, Daisy responded:
> **McGuire:** I don't really know, you know, I am not the only one who is taking care of her.
> **Gillis:** Well, who else is taking care of her?
> **McGuire:** My husband, too, takes care of her.
> -- Testimony by a neighbor "that she had observed McGuire pick up the infant by 'one of her arms.' She had also seen him, when the baby was crying, roughly pinch her cheeks together, and do other 'bad things.' Mrs. McGuire, the witness said, was a 'very caring mother' toward Tori, who was never seen to 'abuse the child' in any way."

People v. McGuire, No. A017800, at 4 (Cal.App. Jan. 15, 1985).

> -- The fact that one of the injuries -- rectal tearing -- is sexual in nature, and of a type more likely made by a man than a woman.

"confession," made only after she was granted immunity and had the luxury of attempting to save her husband at no risk to herself, is halting and tentative, marked by evasion and lapses of memory. RT 333-39, 341-42, 351-58, 364, 385. It is also internally inconsistent, RT 353-56; contradicted by her earlier statements to the police and at the preliminary hearing, RT 370-75, 410-11, and by Mr. McGuire's own statements to the police, RT 209-10 (Book II), 251 (Book III); and inconsistent with the weight of the medical evidence.[8/] The jury deliberated for three days and had extended passages of the trial transcript read back to it, including large portions of Mrs. McGuire's testimony. RT 254A (Book I), 777. This jury was clearly not inflamed by passion. McGuire got no worse than he deserved.

It is this type of inquiry, or something akin to it, that the panel was required to pursue under *Chapman*. Its unsubstantiated assertion that the evidence against McGuire "was certainly not overwhelming" simply does not do the job.

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8. Mrs. McGuire claimed to have killed the baby some time in the afternoon, "[a] long time" before her husband returned home. RT 353; *see also* RT 348; *but see* RT 356 ("I beat my child when he, shortly before he comes home on that evening."). The infant most likely died within minutes of having been beaten. RT 139-140 (Book II). Yet when the McGuires took the baby to the hospital at nine in the evening, RT 87 (Book II), the doctors believed they had a chance of resuscitating the child because irreversible brain swelling had not yet begun, indicating that her death was very recent. RT 86, 98-99, 169-71 (Book II).

D. *Reprosecution Of McGuire May Be Precluded*

When a federal court grants a writ of habeas corpus, the state normally has the option of retrying the defendant. This is not the case, however, when there is a determination that the prosecution failed to meet its burden of proof on any element of the offense; under those circumstances, retrial is barred by the double jeopardy clause. *Burks v. United States*, 437 U.S. 1 (1978).

While the point is not entirely free from doubt, the opinion contains statements that could well preclude retrial of McGuire. Specifically, the panel casts aspersions on the prosecution's case by stating that "only the barest threads connect McGuire to the crime." 902 F.2d at 755. Worse still, the panel characterizes the state's evidence as suggesting no more than "mere shadows of guilt which *leave ample room for reasonable doubt*." *Id.* at 756 (emphasis added).

It is entirely possible that the state courts on remand will read these passages as holding that the prosecution failed to introduce sufficient evidence to meet its constitutional burden of establishing guilt beyond a reasonable doubt. Certainly it would be difficult to come up with language more clearly conveying this idea than that used by the panel. If the state court *does* construe the panel's opinion as precluding a retrial, there will be no possibility of correcting the error. Once McGuire is

released, the prosecution has no mechanism for coming into federal court to complain, as the state is not entitled to collaterally attack the state judgment.

Conclusion

The panel has overturned a state conviction, and has done so in a manner that seriously and unjustifiably interferes with the authority of the state courts, hamstrings state prosecutors and may result in the permanent release of a defendant who was justly and properly convicted of a heinous crime. We make a grave mistake by failing to take the case en banc to correct these errors and set the law of the circuit back on course.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

February 25, 1991

Mr. Dane R. Gillette
Deputy Attorney General
455 Golden Gate Ave., Rm. 6200
San Francisco, CA 94102

Re: Wayne Estelle, Warden
v. Mark Owen McGuire
No. 90-1074

Dear Mr. Gillette:

The Court today entered the following order in the above entitled case:

The motion of respondent for leave to proceed in forma pauperis is granted. The petition for a writ of certiorari is granted.

Very truly yours,

William K. Suter, Clerk